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25

Cape of Good Hope. Supreme Court.

ADVOCATE LOUIS O. MILLER
EX LIBRIS
JOHANNESBURG

REPORTS OF ALL CASES

DECIDED

IN THE SUPREME COURT

OF THE

CAPE OF GOOD HOPE,

DURING THE YEAR 1898

(WITH TABLE OF CASES AND DIGEST).

REPORTED BY

J. D. SHEIL, Q.C.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW, ADVOCATE OF THE SUPREME COURT, AND ASSISTANT LAW ADVISER TO THE CROWN.

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HON. MR. JUSTICE BUCHANAN (Acting Chief Justice).

HON. MR. JUSTICE MAASDORP.

HON. MR. JUSTICE LAURENCE (Judge President), sat on October 12, 14, and 26.

HON. MR. JUSTICE SOLOMON, sat from November 1 to December 31.

Attorneys-General.

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HON. T. L. GRAHAM, Q.C., from 14th May, 1898, to 14th October, 1898.

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Salisbury Reef G.M. Co. v. British South Africa Co. ... 443

Acceptilatio, *see* **Release.**

Act 15 of 1856, section 1—Master and Servant—Contract in writing.
R. entered into a contract with C. in England whereby she agreed to serve C. as part kitchen and housemaid for one year from date of arrival at the Cape of Good Hope. This contract was reduced to writing and signed by R. but not by C.
Held, *not to be a contract in writing in terms of Act 15 of 1856, section 1.*
Richmond v. Morgan Crofton ... 220

2. ——15 of 1856, Chap. VI., section 3.
Contravention of the above section can not be punished by imprisonment with hard labour.
Regina v. Rosser 224

3. ——20 of 1856, schedule B, rule 10.
Kriel v. Kriel 412

4. ——20 of 1856, schedule B, rule 13.
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5. ——20 of 1856, schedule B, rule 29.
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6. ——20 of 1856, schedule B, rule 29.
Reyersbach v. Rodger's Executor 535

7. ——21 of 1876, section 4.
Brink v. The Attorney-General 33

8. ——9 of 1877, section 10.
Johns v. Colonial Government 290

9. ——22 of 1877, *see* Trade-mark.

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10. ——28 of 1881, *see* Derelict Lands Act.

11. ——37 of 1882, *see* Crown Land.

12. ——48 of 1882, sections 2, 58—Servant — Theft — *Autrefois acquit.*
An after-sorter employed in a diamond-mine who receives no regular wages, but is paid a percentage upon his finds and is entitled to come and go when he likes, is not a servant within the meaning of Act 48 of 1882, section 58, and may legally be charged under section 2 of that Act.
Regina v. Daniel Smith ... 406

13. ——9 of 1883, *see* Election Petition.

14. ——28 of 1883, section 48.
Hochfeld v. Sutherland Licensing Court 119

15. ——28 of 1883, section 87—Seizure of liquor without warrant.
Staples v. Jackson 263

16. ——23 of 1888, section 28.
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17. ——23 of 1888, section 29.
Regina v. Solomon 130
Regina v. Van Rooi 148

18. ——40 of 1889, *see* Divisional Councils Act.

19. ——25 of 1891, section 13.
Adams v. Tulbagh Licensing Court 120

20. —— ——section 24.
Green v. Truman 99

21. ——34 of 1891, section 60, *see* Medical and Pharmacy Act.

22. ——9 of 1892, *see* Election petition—Parliamentary election,

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23. ——25 of 1892, sections 86, 97 — Companies — Amendment of register—Registration of contract.
Ex parte Contat 21

24. ——23 of 1892, section 71—Court of Officers — Sentence — Announcement in open court.
H., *a private in the Cape Mounted Rifles, was tried for desertion before a Court of Officers and found guilty. He was informed of the verdict of the Court but was not informed at the time what sentence had been passed upon him, nor was any announcement of the sentence made in open court.* H. *was then removed to the public prison and there confined. The proceedings of the Court were then transmitted to the senior officer of the Colonial Forces in compliance with section 71 of Act 32 of 1892, and were confirmed by him ten days after the verdict had been announced. Seven days subsequently to this the sentence was announced to* H.
Held, *that there had been no such irregularity as would justify the quashing of the proceedings.*
Hatherell and Others v. Sprigg, N.O. 215

25. ——19 of 1893, section 44.
Spangenberg v. G. Findlay & Co. 150

26. ——26 of 1893, section 92, *see* Valuation.

27. ——26 of 1893, section 170, sub-section 8.
De Fourd v. The Town Council of Cape Town 531

28. ——12 of 1895, section 2.
Peek, Frean & Co. v. Carr & Co., Ltd. 207

29. ——6 of 1896, section 5.
Ex parte McIlwaine 265

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30. ——29 of 1896, sections 2, 31, 32.
Regina v. Hudson 324

31. ——1 of 1897—Lunatic—*Curator bonis.*
In re Benade 269

Admission of Advocate, *see* Advocate.

Advocate—Admission of—Bachelor of Laws—Honorary degree—*Honoris causa* degree—University Incorporation Amendment Act, 1896.
The degree of Bachelor of Laws conferred by the Cape University, without examination on a person who has obtained an equivalent degree from another University, does not, since the passing of Act 6 *of* 1896, *entitle the holder to be enrolled as an advocate of the Supreme Court.*
Ex parte McIlwaine 265

Agency—Conspiracy to wage war.
A person who conspires with others to wage war against the Queen and joins them in appointing a leader to conduct the war, is responsible for damage done to individuals by the orders of such leader if such orders might reasonably have been anticipated as a consequence of the conspiracy.
Steenkamp v. Kyd 260

Agency— Sale — Representations to Agent.
Fraser v. Solomon 22

Agent, *see* Principal and Agent.

2. ——Dock, *see* Dock agent.

3. ——of Life Insurance Company, *see* Insurance.

Amendment of pleadings—Magistrate's discretion.
An exception having been taken and allowed in a Magistrate's Court to a summons by which G. *was sued as executor testamentary of* B.'s *estate, on the ground that*

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he ought to have been sued in his capacity as secretary of a certain company whose secretary for the time being had been appointed as one of the executors, an application was made for an amendment of the summons. The Magistrate refused to allow the amendment on the grounds that a material allegation had been omitted, and that such an amendment would encourage laxity of practice. There was a second exception that the co-executor ought to have been joined as co-defendant.

Held, *under the circumstances, that there was not sufficient ground for disturbing the judgment.*

Poole v. Bawden's Estate ... 134

2. ——of Record of Magistrate's Court.

Cloete v. Van Aardt and the R.M. of Barkly East 228

Appeal.—Matabeleland Action — Security, *de restituendo.*

Security on appeal to the Privy Council ordered to be given to the satisfaction of the High Court of Matabeleland, the original action having been tried there.

The Torva Syndicate v. Kelly. — The Torva Syndicate v. White's Estate. — The Torva Syndicate v. Mocks 214

2. ——from Magistrate's Court — Nominal damages.

Where the evidence given in a Magistrate's Court would not have justified the Magistrate in awarding more than nominal damages to the plaintiff for a technical breach of contract, the Supreme Court refused to disturb a judgment in which he dismissed the case.

Sauermann v. English & Scottish Law Life Assurance Association 103

3. ——criminal, *see* Criminal appeal.

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Aquæductus, *see* Water-rights.

Arbitration—Award— Uncertainty— Finality—Reference back—Misconduct of arbitrators—*Reductie* — Expropriation — Evidence — Municipal Regulations.

An arbitrator, after having published his award, cannot alter it unless it is referred back to him by the Court for that purpose.

Among the objects for which the Court would refer back the award are to correct a material mistake admitted by the arbitrator himself, to reconsider the award in consequence of the discovery of new and material evidence, and to fix the exact amount payable where the award has laid down the basis upon which the amount should be ascertained.

The admission by arbitrators, which would not be strictly admissible in a Court of law, is not a ground for impeaching the award, unless there was an absence of admissible evidence in support of the award, in which case the award might be set aside, but not referred back.

Where land belonging to a religious body is expropriated by a Town Council for the purpose of town improvements, evidence is admissible to show the value of the land as a building site for shops and offices intended to be built for the purpose of letting the same, and thus obtaining a revenue for church purposes.

Such evidence is admissible notwithstanding (a) *that the Town Council has the power under its regulations to require that all plans of new buildings shall first be approved of by them,* or (b) *that the grant of land had been made on condition that it should be used exclusively for church purposes.*

Disproportion of the amount

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awarded to the true value is not a ground for impeaching the award, unless the disproportion is so gross as to bear on the face of it clear proof of partiality or corruption, in which case the award might be set aside, but not referred back to the guilty arbitrator.

Dutch Reformed Church v. Town Council 13

2. — - Award — Rule of Court — Costs.

Where by a deed of submission to arbitration it was agreed that the costs should be in the discretion of the arbitrators but that they should be subject to taxation by the Taxing Officer, and the arbitrators awarded that all costs should be paid by the respondents and the respondents objected to the award being made a Rule of Court before taxation, the objection was over-ruled.

Davison Brothers v. Colonial Government 358

Arrest—Attachment *ad fundandam jurisdictionem*—Security—Jurisdiction—8th Rule of Court—Domicile.

A person who cannot, because of being a non-resident, be summoned by the ordinary process of the Court cannot be arrested under the 8th Rule of Court, and, therefore, where it is made to appear that a person so arrested is a non-resident the Court will order the discharge of the writ but may there and then make an order for the attachment of the defendant's person ad fundandam jurisdictionem *and for the giving of sufficient security to perform the judgment of the Court.*

Schunke *v.* Taylor and Symonds *(8 Juta, 103) approved.*

Solomon v. Wolff 184

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2. ——Fraudulent Insolvent.

Ex parte Garlick and Others.
In re Jacobson 500

Articled Clerk.
In re Crawford 127

Attachment *ad fundandam jurisdictionem*, *see* Arrest.

Attorney—Articles of Service.

The applicant having been articled in this Colony to an Attorney of the Supreme Court, served him for about a year and nine months, but upon the attorney leaving for Bulawayo to practise there the articles were duly transferred to another attorney in this Colony. After so serving within this Colony for two years and four months the applicant proceeded to Bulawayo and there served the attorney to whom he had been originally articled. The Court now granted his application that upon his passing the requisite examination in this Colony, eight months' service in Bulawayo might be allowed to count as part of the requisite three years' service.

In re Crawford 127

2. —— Power of, *see* Power of Attorney.

Auction, sale by—Misrepresentation.
Crewe v. Zweigenhaft 193

Autrefois acquit.
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Award of arbitrators, *see* Arbitration.

Bail—Extradition.
Ex parte Hertz and Hertz ... 348

Balance-sheet.
Ex parte Helm 213

Ballot, *see* Parliamentary Election.

Bar, removal of.
Stiglingh v. Rhodes 373

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Bill of exchange—Proof of presentment for payment—Act 19 of 1893, section 44.
The payee of a bill of exchange having sued the drawer in a Magistrate's Court, the Magistrate gave judgment for the plaintiff without having had any proof of presentment for payment to the drawee or proof that presentment was dispensed with by virtue of Act 19 *of* 1893, *section* 44.
Held on appeal, *that the decision was wrong.*
Spangenberg v. G. Findlay & Co. 150

Bond—Will.
Re Meiring's Estate 311

Boundary of farm—Overlap.
Where there is an overlap in the boundaries of two farms and no beacons can be found to assist the Court the older grant must be allowed to prevail.
Hugo v. Russouw and Others ... 187

British South Africa Co., *see* Charter.

Broker, authority of.
Glennie v. Schwalbe 209

2. ——Commission.
A broker having been indirectly employed to sell a farm belonging to the defendant, introduced an intending purchaser S. *to the defendant, who thereupon entered into negotiations with* S., *with the result that* S. *bought the farm, as well as a second farm belonging to the defendant.*
Held *that, although the broker was entitled to commission in respect of the farm which he had been employed to sell he could not claim commission in respect of the sale of the second farm.*
Brittain v. Thieme 78

3. —— ——Raising loan on mortgage—Conveyancer.
The plaintiff, who had been employed by the vendor of certain land as conveyancer to transfer it to the purchaser, was employed by the purchaser as broker to raise a loan on mortgage of the land. He obtained the promise of a loan from A. *but, owing to a defect in the title, of which the purchaser had no previous knowledge, transfer could not be effected in terms of the purchase and the loan fell through.*
Held, *that the plaintiff was not entitled to a commission from the purchaser for his services in obtaining a promise of the loan.*
Steer & Co. v. Impey 454

4. ——payment of purchase price to.
Acutt & Crewe v. Liley ... 173

Brothel—Interpretation of term.
De Fourd v. The Town Council of Cape Town 531

Building on land of another—knowledge of owner—Destruction of building.
Froneman v. Petzer 26

Building society — Partnership — Winding up— Contributories—Calls—Rules of society—Powers of directors — *Ultra vires* — Borrowing powers—Loan creditors—Ordinary outside creditors.
A building society, being an association of persons subscribing to a common fund to be advanced on interest to some of the members on the security of landed property, does not constitute a partnership.
Persons dealing with such a society must make themselves acquainted with its rules, and where under such rules the directors have power to borrow money not exceeding a certain limit, the members are not bound, in case the limit is exceeded, to pay such excess except to the extent to which the society is proved to have bene-

fited by the excessive borrowing. On the winding up of such a society members who have received advances repayable in instalments become liable to pay forthwith the full balances owing by them and, in case of an insufficiency of assets for the payment of the costs of liquidation, the claims of ordinary outside creditors in full and the loan debts to the extent authorised by the rules, all the members are personally liable to contribute towards the payment of the deficiency.

In re Cape of Good Hope Permanent Building Society 360

Buildings, general line of—Municipal regulation.

Short & Co. v. Town Council of Cape Town 224

Cancellation of lease, *see* Lease.

Charter—British South Africa Company—Duty imposed by statute or charter — Non-feasance — Damages.

The 10th clause of the Company's Charter directs that "the Company shall to the best of its ability preserve peace and order in such ways and manners as it shall consider necessary."

Held, on appeal, *that a declaration alleging that in 1896 the natives rose, that the plaintiffs' property was destroyed in consequence of the rising, and that the plaintiffs did not receive from the Company the protection which the Company was bound to afford them under the Charter, does not disclose a cause of action.*

British South Africa Company v. Salisbury Reef Gold-Mining Company 447

Cheque—Forgery — Intent to defraud.

Regina v. Fitzgerald 294

Collision—Damages, direct and consequential—Demurrage.

In an action for damages for a collision, it was ordered by consent that the owners of the ship in default should repair the damaged ship, but the question of consequential damages was left to the Court.

Held *that the owners were also liable to pay for the services of tugs which had been obtained with the advice of those in charge of the ship in default to bring the injured ship into a place of safety, and also for demurrage during the time within which the repairs could have been effected.*

Romano v. The Admiralty ... 304

Colonial Forces Act, *see* Act 32 of 1892.

Commission—Broker.

Brittain v. Thieme 78

2. ——Broker—Conveyancer.

Steer & Co. v. Impey 454

Commission *de bene esse.*

Application for a commission to examine a defendant refused where he had left the Colony with the knowledge that the suit was coming on.

Morgan v. Hiddingh 318

Company — Foreign registration — Registration in the Colony—Mistake.

Where a company registered with limited liability in the South African Republic was subsequently, through mistake, registered in the Colony under Act 25 of 1892,

The Court, *on the application of the Company and on being satisfied that creditors would not be prejudiced, ordered the removal of the name of the Company from the Register of Companies in this Colony.*

Ex parte Holt & Holt, Ltd. ... 517

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2. ——Promoters — Contract — Exception.
Marshall v. African Banking Corporation 401

3. ——*see* Act 25 of 1892.

Compromise—Promissory note.
Van Schalkwyk v. Pienaar's Trustees 329

Condictio indebiti—Payment of debt —Payments by insolvent.
An insolvent paid the attorney employed by him to surrender the estate the sum of £6 and the attorney gave a receipt for the amount "on account of costs of surrender." Afterwards the trustee paid to the attorney his taxed bill of costs in ignorance of the fact that the bill had already been paid in part.
Held, *reversing the decision of the Resident Magistrate of Cape Town that, whether the insolvent paid the money out of his salary or not, the trustee was entitled by way of* condictio indebiti *to recover back the sum which had been accepted by the attorney as part of his bill.*
Storey's Estate v. Du Preez ... 204

2. —— ——*see* Diamond Mine ... 153

Condonation, *see* Divorce.

Consideration for promissory note—Withdrawal of action.
Van Schalkwyk v. Pienaar's Trustees 329

Conspiracy—Act 23 of 1888, section 29.
A prisoner who tells his fellow-prisoners that he intends to escape, and asks them to escape with him, is not, in the absence of consent on their part, guilty of a contravention of Act 23 *of* 1888, *section* 29.
Regina v. Van Rooi 148

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2. —— Overt act — Crime or offence—Escape from custody—Act 23 of 1888, Section 29.
On the trial of prisoners for conspiring to escape from custody in contravention of the 29*th section of Act* 23 *of* 1888, *proof of such conspiracy is sufficient without further evidence of any overt act or attempt in pursuance of such conspiracy.*
Regina v. Solomon and Others... 130

3. ——to wage war — Liability of conspirator for damage.
Steenkamp v. Kyd 260

Constitution Ordinance, sections 8, 10, 38, 50, *see* Election petition.

2. ——sections 56, 57, *see* Election petition.

Contempt of Court--Divorce proceedings—Custody of children—Rule *nisi*.
Warner v. Warner 204

Contract—Claim for rescission on the ground of misrepresentation.
Robinson v. Ryves 414

2. ——in restraint of trade, *see* Restraint of trade.

3. ——Privity of.
Kama and Others v. Colonial Government 57

Contributory negligence, *see* Negligence.

Costs.
Goustyn v. Van Putten 35

2. ——
Cohen v. Engelbrecht 41

3. ——
Benning v. Town Council of Cape Town 249

4. ——"All Costs."
Where the Court had ordered "all costs" to be paid out of a certain estate this was interpreted subsequently to include costs between attorney and client.
Van As v. Nel and Nel 129

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5. ——Award of Arbitrators.
Davison Brothers v. Colonial Government 358

6. ——Magistrate's discretion.
Wake v. Peake 326

7. —— Partnership — liquidating partner.
The Court, *having sustained with costs the exception* lis alibi pendens *to a claim advanced by a liquidating partner agaainst his co-partner, subsequently granted leave to issue a writ against the plaintiff personally for the costs of the judgment.*
See Wolff v. Solomon (8 Sheil, 340.)
Solomon v. Wolff. *Re* Victor Wolff, N.O., v. Solomon ... 519

8. ——Private prosecution.
Oliff v. Worcester Municipality 242

9. ——Tender.
Crooks & Co. v. Murray ... 310

Counterfoils — Inspection of, *see* Parliamentary Election.

Criminal appeal—Expiration of time allowed—Act 21 of 1876, section 4.
Brink v. The Attorney-General. *In re* Regina v. Ben Desi and Hallam Kulu 33

Crown Land.
Kama and Others v. Colonial Government 57

2. ——Mineral lease.
Johns v. Colonial Government 290

3. ——Quitrent grant—Expenses of grant — Survey expenses —Act 37 of 1882
A licensee of land under Act 37 of 1882 is bound, on obtaining a title deed at the expiration of his licence, to pay the expenses reasonably incurred by the Government in surveying the land and framing a diagram thereof.
Van der Merwe v. Colonial Government 106

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Custody of children.
Franciscus v. Franciscus ... 56

Custom—Docks.
Duke & Co. v. A. R. McKenzie & Co. 494

Damages, direct and consequential.
Romano v. The Admiralty ... 304

2. ——*Volenti non fit injuria.*
Davids v. Mendelsohn 410

Defamation—Privileged occasion.
S. *having information concerning an attempt to smuggle brandy gave notice to* L., *a Customs Officer, at whose request he went to the defendant, the Collector of Customs in Cape Town, for the purpose of making an explanation. Before he could make any explanation the defendant in the presence of* L. *said to* S. "*You are the delinquent.*"
Held, *that these words were libellous.*
Held, *further, that though the evidence showed that* L. *was a clerk subordinate to the defendant, inasmuch as the fact was not clearly set forth in the pleadings the Court could not take into consideration the defence that the occasion was privileged.*
Strasburger v. Orpen 315

Default—Removal of bar—Leave to plead.
Stiglingh v. Rhodes 373

Demand by post—Direction.
Goustyn v. Van Putten 35

Demurrage for effecting repairs after collision.
Romano v. The Admiralty ... 304

Depositing site—Act 19 of 1883 section 35.
Leicester Brilliant Syndicate v. Colonial Government and New Elandsfontein M. and E. Co. ... 153

Derelict Lands Act.
An order for registration of title under Derelict Lands Act refused.
Ex parte De Vries 313

Diamond mine—Claim—Depositing site — Rent—Duress—Protest—*Restitutio in integrum* – *Condictio indebiti.*
A claimholder to whose licensed claims there has been attached the right to use and occupy the requisite depositing sites is liable to pay to the owner of the soil the rent authorised by the 35th section of Act 19 *of* 1883, *even although he does not occupy or require such claims.*
Such right is sufficiently attached after a rough plan has been made by direction of the Commissioner of Crown Lands indicating the depositing sites available for the claimholder and binding on the owner of the soil.
In an action in the nature of restitutio in integrum *for relief against a payment alleged not to have been legally claimable a protest made on one ground against the payment cannot be made use of for the purpose of recovering, on a wholly different ground, the money thus paid.*
Leicester Brilliant Syndicate v. the Colonial Government and the New Elandsfontein Mining and Estate Co. 153

Diamond Trade Act, *see* Act 48 of 1882.

Directors, power of, *see* Building Society.

Divisional Councils' Act — Voters' roll — Revising Court — Divisional Councils Act—Occupier —Manager — Assessment roll— Expunging of name from Roll.
The owner of a farm was enrolled as a voter for members of the Divisional Council under subsection 1 of section 17 of Act 40 of 1889. His manager and servants lived in separate houses on the farm, which were not valued apart from the farm according to the Assessment Roll, but their names were inserted in the Voters' Roll notwithstanding objections made by the applicant, a duly qualified voter, before the Revising Court.
Held, *that the manager and servants were not occupiers in terms of the second sub-section of the 17th section and that the names had been improperly inserted in the Voters' Roll. The names thus illegally inserted were accordingly ordered to be expunged from the roll.*
O'Brien v. Christian and others 327

Divorce Adultery — Condonation— Reconciliation.
Niemand v. Niemand 254
2. ——Custody of children.
Franciscus v. Franciscus ... 56
3. ——Evidence –Photographs.
Kaye v. Kaye 194
4. ——Funds to defend action.
Muller v. Muller and Another ... 5

Dock agent—Damage to goods— Custom.
The defendants acting as dock agents received and loaded from a ship at the docks a cigarette machine packed in a wooden case and consigned to the plaintiffs. The plaintiffs' delivery agent subsequently removed the case from the defendants' store without any survey or examination having been held, and without the defendants' knowledge. When delivered at the plaintiffs' store, both case and machine were found to have been damaged. It was the custom of the port not to recognise any lia-

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bility upon the landing agent if goods were removed without his permission although they were subsequently discovered to be damaged.

Held, *that this custom did not necessarily remove any liability if damage had actually been caused by the defendants, but that the onus of proving that the damage occurred while the goods were in the defendants' possession lay upon the plaintiffs.*

Duke & Co. v. A. R. MacKenzie & Co. 494

Domicile, *see* Arrest.

Election Petition—Day of hearing.

Application to expunge certain allegations in petition and file counter charges.

Sonnenberg v. Haarhoff and Fincham 373

2. ——Paid agents — Scrutiny — Constitution Ordinance, sections 8, 10, 38, 50 - List of voters—Minors—Aliens and convicted persons.

An election petition claimed, inter alia, *that the names of certain persons whom the petitioner alleged to be minors, aliens and convicted persons, and to have voted for the respondent, should be struck off in a scrutiny.*

Held *that the voters' list on which the names of these persons stood at the time of the election was conclusive as to their right to vote in terms of the proviso to the 50th section of the Constitution Ordinance.*

Crewe v. Botha 424

3. ——Time for presentation—Act 9 of 1883, section 4, sub-section 2 — Constitution Ordinance, sections 56, 57.

A proclamation under section 57 of the Constitution Ordinance, setting out that, whereas a certain candidate for the House of Assembly has been returned for two electoral divisions, and has elected to represent one of those divisions, a fresh election shall therefore be held in the other division is not such a proclamation as is referred to in Act 9 of 1883, section 4, sub-section 2.

Burton v. Rhodes and Hill ... 403

4. ——Withdrawal—Notice.

An election petition cannot be withdrawn without the leave of the Court, even where the respondent has resigned his seat.

Sonnenberg v. Haarhoff and Fincham 537

Escape from custody.

Regina v. Solomon 130

Evidence—Reading over—Magistrate's Court.

Where at a criminal trial the evidence given by a particular witness at the preliminary examination was simply read over to him, the Court refused to quash the conviction on this ground inasmuch as the other evidence was regular and sufficient.

Regina v. Qewe 359

2. ——Remittal to Magistrate's Court for further evidence refused.

Louw v. Fryer 253

3. ——Written control—Variation.

Van der Westhuizen v. Valenski 273

4. ——*see* Arbitration.

5. ——*see* Theft.

Execution on immovable property, *see* Practice.

Executor—Release by deceased person, *see* Release.

Executor dative—Appointment.

In re Pisani 538

Expropriation, *see* Arbitration,

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Extradition—Bail—Germany.
The Court refused to admit to bail persons under arrest and awaiting extradition on a charge of having committed an extraditable offence in Germany, the Consul-General for Germany opposing the application on behalf of his Government.
Ex parte Hertz and Hertz ... 348

Fees in Magistrate's Court—Rule of Court 308.
Under Rule 308a, section 2, the fee for every hearing of a case in a Magistrate's Court is two pence in the pound, but the fee is in no case to exceed three shillings and four pence. Under section 3 the fee for hearing is reduced one half in certain cases.
Held, *that the reduction applies also to the maximum fixed by the 2nd section, and that consequently no more than one shilling and eight pence can be charged under the 3rd section.*
Weir & Co. v. Colonial Government 409

Female prisoners—Reformatory.
Regina v. Bovenstaande ... 39

"Flotation"—Claims—Prospector—Company—Gold mining.
The plaintiff, being a "prospector," acquired for the defendant certain gold-mining claims in Matabeleland under an agreement whereby he was to receive payment of a certain sum on "flotation" of the claims by the defendant.
Held, confirming the judgment of the High Court of Matabeleland *that the sale and transfer of the claims by the defendant to a company formed for the purpose, amongst others, of gold-mining constituted such "flotation" and entitled the plaintiff to payment of the stipulated sum.*

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Torva Exploring Syndicate, Ltd., v. Kelly.—Torva Exploring Syndicate, Ltd., v. Mocks.—Torva Exploring Syndicate, Ltd., v. Lamb, N.O. 159

Foreign judgment.
Levy & Co. v. Hesse 170

2. ——Suit—*Lis alibi pendens.*
Wolff, N.O., v. Solomon ... 340

Forgery—Cheque—Intent to defraud.
The false indorsement in the name of the payee of a cheque payable to his order does not constitute forgery if done without intent to defraud.
Regina v. Fitzgerald 294

Franchise and Ballot Act, 1892, *see* **Parliamentary Election.**

Fraud.
Shortle v. Colonial Government 143

Governor's commission—Grant of land—Public seal—Crown land—Native locations—Trading stations—Privity of contract.
By a document executed in 1861 by the then Governor under his hand, but not under the public seal of British Kaffraria, a tract of land was "given over" to the Chief Kama, his family and tribe, for their occupation and use under such regulations, fiscal or otherwise, as might from time to time be fixed by the Government, and on condition that they should perform certain services for the Government. The Governor's commission authorised him to issue grants of land in British Kaffraria but only under the public seal of that territory.
Held, *that the document could not operate as a grant of the land, and that the land remained Crown land subject to the right of occupation of the present Chief, his family and tribe.*

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Held, further, *that the present Chief and his tribe, having always performed the conditions upon which the Governor "gave over" the land, and having ratified the stipulation made on their behalf, are entitled to a declaration of their rights as against the Government.*

Held, further, *that the Government is bound by the Governor's promise except in so far as the Legislature may have passed any enactments which are inconsistent with the fulfilment of such a promise.*

Held, *that Acts dealing expressly with native locations on Crown land, including Act 40 of 1879, Act 37 of 1884, Act 28 of 1888 and Act 33 of 1892, apply to native locations within the tract in question.*

Held, further, *that the Government has no right, without the concurrence of both Houses of Parliament, to grant or lease trading stations within the tract or to issue titles to land therein under Act 37 of 1882 and a declaration made accordingly.*

The case of Tradesmen's Benefit Society *v.* Du Preez *(5 Juta, 209) approved and applied.*

Kama and Others v. Colonial Government 57

Grazing right—Reasonable number of cattle.

Heidelberg Municipality v. Uys 178

Honorary degree, *see* Advocate.

Husband and wife — Adultery — Divorce —Condonation— Reconciliation.

A decree of divorce will not be granted at the suit of a husband who, knowing of his wife's adultery, continues to live under the same roof with her although not cohabiting with her, under circumstances which would justify the belief that a reconciliation has taken place.

The same rule applies to a wife who continues to live in the same house with an adulterous husband, but the circumstances which would justify the inference of a reconciliation would not necessarily be the same in both cases.

The plaintiff having married her husband against the wishes of her relatives, discovered after some time that he was living in adultery with another woman in the same house in which they were living. She remonstrated with him once, but he answered her with violent language and continued his adulterous intercourse for twelve years. During that time she never had sexual intercourse with her husband, and at the end of that time she left him and sought refuge with her brother, who assisted her in instituting an action for divorce. The parties were poor and there were children of the marriage.

Held, *that the plaintiff was entitled, under the circumstances, to a decree of divorce.*

Niemand v. Niemand 254

2. ——Divorce — Contract in restraint of trade.

Merrington and Adams v. Welt 355

3. ——Divorce — Funds to defend action.

Where the defendant in an action for divorce was entitled by virtue of an ante-nuptial contract between the parties to a sum of £200, which sum had not been paid to her, the plaintiff was restrained from proceeding with the action until he had first paid her £30 to enable her to defend the same.

Muller v Muller and Another... 5

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4. ——Separation *a mensa et thoro*—Habitual intemperance.

Habitual intemperance on the part of husband or wife, so long continued as to leave no hope or prospect of reform, is a good ground for granting a decree of separation a mensa et thoro *to the other spouse.*

Poggenpoel v. Poggenpoel ... 36

5. ——Transfer of immovable property by wife without the assistance of her husband.

Ex parte Stork 7

Immovable property, Execution on, *see* Practice.

Impounding cattle—Hut-burning—Building on land of another – Knowledge of owner.

F. *leased certain land to* P. *and verbally agreed to allow him the use of a certain paddock when he was working with his cattle. Within half an hour after the cattle had been outspanned subsequent to this being used* F. *seized them in the paddock and impounded them.*

Held, *that* F.'s *action was illegal.* P. *with the knowledge of* F. *built a hut on the paddock and it was occupied by his servant.* F. *gave notice to the servant to quit, and on his neglect to do so burnt the hut.*

Held, *that* P. *was entitled to damages for the destruction of the hut.*

Froneman v. Petzer 26

Injunction.

McGregor v. Divisional Council of Clanwilliam 389

Insolvency, Fraudulent—Arrest.

A warrant for the arrest of a person charged with fraudulent insolvency may be issued before the provisional order for the sequestration of his estate has been confirmed.

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Ex parte Garlick and Others. *In re* Jacobson 500

2. ——Ordinance 6 of 1843, sections 27, 28—Proof of debt—Magistrate's jurisdiction— Kinderbewys — Compromise — Promissory note—Consideration—Account.

After a proof of debt has been admitted by a Resident Magistrate under the 27th section of the Insolvent Ordinance, he has no jurisdiction to reopen such account. Any subsequent statement of account under the 28th section should proceed upon the assumption that the proof was correctly admitted unless it has been rejected by a superior Court.

A person in whose favour a deed of Kinderbewys has been passed in customary form has a preference upon the insolvent estate of a surety, against whom the suretyship debt has been specially registered in the Deeds Office, for the inheritance found to be due by the surviving parent on remarriage. The applicant having proved his debt under a deed of Kinderbewys against the insolvent estate of one of the sureties the proof was admitted by the Magistrate. No application was made by the trustees to a superior Court to reject the proof, but they successfully applied to the Magistrate for a statement of account under the 28th section of the Ordinance. Upon such statement of account the proof was reduced from £369 to £40 and a balance found to be due by the applicant to the trustees of £129, whereas in fact he was a preferent creditor for a larger amount. The trustees *brought an action against him for such balance, but withdrew it upon his giving them a promissory note for £80 in full satisfaction of their claim.*

Held, *in an action brought by them on the note, that the applicant was not debarred from disputing the Magistrate's jurisdiction, in regard to which there had been no dispute and therefore no valid compromise.*

Held, further, *that the withdrawal, under the circumstances, of the suit for £129 by the trustees constituted no valid consideration for the note.*

Van Schalkwyk v. Pienaar's Trustees 329

3. ——**Ordinance 6 of 1843, Section 30- Voting.**

A creditor who holds a general bond upon an insolvent estate is entitled to vote for the full amount of his claim upon a resolution dealing with the sale of all the assets in the estate.

Burger and Others v. De Villiers.—*In re* **Van der Merwe's Insolvent Estate** 219

4. ——**Payment by insolvent.**

Storey's Trustee v. Du Preez ... 204

Insurance—Life—Premium—Lapsed policy—Concealment—Declaration of health—Receipt—Agent of Life Insurance Company.

The agent of an Insurance Company received the premium on a life policy from the husband of the insured, more than six months after it fell due in ignorance of the fact that the insured was seriously ill from typhoid fever. The agent informed the husband that the insured would have to come to the office to make a declaration of health, whereupon the husband said that she was sickly, and it was arranged that she would come as soon as she could, and that in the meantime, the money could be retained by the agent as a deposit. The wife died a few days afterwards without making such a declaration.

Held *that the executor of the deceased could not recover the amount of the policy.*

Marnewicke's Executor v. S.A. Mutual Life Assurance Society 52

2. —— —— **Premium — Contract — Nominal damages — Failure of consideration—Policy — Reasonable time—Appeal.**

Upon payment and acceptance of the premium a contract of insurance is complete for the period for which the premium was paid although no policy is delivered to the insured. In the absence of any stipulation as to time the policy must be delivered to the insured within a reasonable time, but he is not entitled to recover back the premium if the policy is not delivered to him within such reasonable time, there being no failure of consideration for the payment of the premium.

*The plaintiff's application for the insurance of his life having been accepted by the defendant company, he paid the half-yearly premium and received a receipt by which the company undertook to give him a policy. The policy was sent from England to the company's agent in this colony, who never delivered it to the plaintiff. Before the lapse of the period for which the premium had been paid the company offered to issue a fresh policy at the same half-yearly premiums, and otherwise on the same footing as the missing policy, but the plaintiff refused the offer and claimed back the premium on the ground of failure of consideration, or in the

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alternative damages for breach of contract. The plaintiff admitted that he did not require the policy for the purpose of raising money thereon. The Magistrate, having dismissed the case.

Held, *that the premium could not be recovered back and that inasmuch as the evidence would not have justified the Court below in awarding more than nominal damages for a technical breach of contract, the Supreme Court should not disturb the judgment.*

Sauermann v. English & Scottish Law Life Assurance Association 106

Intemperance, Habitual—Separation *a mensa et thoro.*

Poggenpoel v. Poggenpoel ... 36

Intent to defraud.

Regina v. Fitzgerald 294

Interdict.

K. *instituted an action for damages against* S. *in a Magistrate's Court. While the action was pending, on the application of* K. *representing that* S. *was expecting to receive a certain inheritance in a short while, and that it was feared that before the termination of the action he would remove his property, with the result that nothing would be left to satisfy* K.'s *claim, the Magistrate interdicted* S. *from disposing of any of his movable property, and also interdicted the inheritance from being paid to him.*

On appeal, *the interdict was discharged.*

Steenkamp v. Kyd 252

2. ——

An interdict restraining transfer of property refused, in the absence of prima facie *evidence of sale to the applicant as alleged by him.*

Melekov v. Friedmann 349

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3. ——Infringement of trade mark.

Lever Brothers (Limited) v. The Star Perfumery and Soap Co.... 231

4. ——Sale of goods not pointed out or set apart for the purchaser.

Fisher v. Harrison 43

Joint debtors—Summons.

Moss v. Shipley 536

Judicial separation, *see* Husband and wife.

Jurisdiction, *see* Arrest.

2. ——of Magistrate — Rights in future—Ownership of property.

Lawrence v. Cape Town Town Council 114

3. —— —— ——

Malherbe v. Grewe 102

4. —— ——

Lambrechts v. Van der Byl ... 532

5. —— ——Agreement to extend.

Oxland v. Key 356

Jury, trial by—Matabeleland.

Salisbury Reef G.M. Co. v. B.S.A. Company 443

Kinderbewys, deed of—Preference upon insolvent estate of surety —Registration.

Van Schalkwyk v. Pienaar's Trustees 329

Lease—Breach of contract—damages.

Samuels v. Wood 337

2. ——Lessor and lessee—Cancellation of lease—Forfeiture—Nonpayment of rent for two years —Mineral lease—Act 9 of 1877.

The lessee of land held under a lease for a long term of years failed to pay any rent for two years, whereupon the lessor notified to the lessee that the lease had been cancelled.

Held, *in an action brought by the lessee to have the lease declared to be of force, that the lease could only be forfeited by order of*

Court after due notification to the lessee that, failing payment of rent within a certain time, such an order would be applied for

Held, further, *that the plaintiff was entitled to succeed notwithstanding the fact that, after the alleged cancellation of the lease, the lessor had executed a lease of the same land in favour of a third party.*

Johns v. Colonial Government 290

Legacy to be paid on attaining majority—Payment authorised to minor.

Re Glynn (minor) 29

Lessee—Transfer—Right to sue for damages.

The lessee of a farm, although not empowered by the owner to sue, has a locus standi *to sue for damages for trespassing upon the land.*

Theron v. Nieuwenhuizen ... 27

Lessor and lessee—Injury to tenant through repairs — Damages — *Volenti non fit injuria.*

The lessor of a house wishing to repair the roof of a house which was becoming dangerous gave due notice to the tenant to leave. The tenant refused to leave and while the repairs were being executed a portion of the roof fell in and injured the tenant.

Held, *that the tenant was not entitled to claim damages for the injury from the lessor.*

Davids v. Mendelsohn 410

2. ——*see* Lease.

License, Liquor—Railway refreshment-room—Sale on Sunday—Conditions—Passengers—Act 25 of 1891—section 24.

The appellant held a retail licence for the sale of liquor at Molteno Railway-station which was not a terminal station. It was a condition of the licence that on Sunday, Christmas Day and Good Friday, he could only supply refreshments while passenger trains were drawn up at the station, and the Government reserved to itself the right of closing the platform against all but passengers. The appellant was convicted in the Court below of a contravention of the law because he had on a Sunday sold liquor to certain persons who had not travelled by railway and had no tickets so to travel, but the sale took place while a passenger train was drawn up at Molteno Station.

Held *that, in the absence of any prohibition in the Act or in the licence against such a sale, the conviction could not be sustained under section 24 of Act 25 of 1891.*

Regina v. Truman 99

Licensing Court—Absence of applicant for renewal—Notice of objection—Act 28 of 1883, section 48.

Where the holder of a bottle-store licence made a written application for a renewal at the annual meeting of the Licensing Court, but having no notice of any objection did not attend at the meeting, and the licence was refused on an objection taken by the members of the Court,

Held, *that the resolution of the Licensing Court should be rescinded, and the application referred back to them for reconsideration.*

Hochfeld v. Sutherland Licensing Court 119

2. ——Act 25 of 1891, section 13.

Adams v. Tulbagh Licensing Court 120

Life Insurance, *see* Insurance.

Liquidation account — Action for amendment.

Roux v. Nel 381

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Liquor—Seizure of, without warrant—Restoration—Act 28 of 1883, Section 87.

J., a constable, having received information that S. *was carrying on an illicit trade in liquor, seized certain liquor belonging to the latter and instituted criminal proceedings against him for contravention of Act* 28 *of* 1883. *S. was acquitted. Immediately after the criminal proceedings the Magistrate heard an action instituted by* S. *against* J. *for the restoration of the liquor and damages, and gave judgment for the defendant on the ground that the liquor seized was no longer in the possession of* J. *and that he had therefore nothing to restore.* On appeal, *the Magistrate's decision was reversed.*

Staples v. Jackson 263

Lis alibi pendens, plea of.

Wolff, N.O., v. Solomon ... 340

Lunatic—Act 1 of 1897 - Curator bonis.

In re Benade 269

Magistrate's Court—Appeal—Reasonable time to prosecute.

Where five months had elapsed between the date of a Magistrate's Court judgment, and the day of hearing an appeal from that judgment, the Court held *that the delay was not so unreasonable as to justify a discharge of the notice of appeal.*

Davids v. Mendelsohn 371

2. **——Fees for hearing — Rule of Court 308A.**

Weir & Co. v. Colonial Government 409

3. **——Messenger—Negligence.**

Lawton v. Wiseman 534

4. **—— Power to sue.**

Kark v. Kremer 42

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5. **——Reading over evidence.**

Regina v. Qewe 359

6. **——Re-opening case.**

Cortes v. Filby 105

7. **—— ——Absence of defendant.**

Where a summons was properly served at the defendant's residence during his absence from home and judgment was given against him in the Magistrate's Court by default of appearance, and he had no knowledge of the summons or of the proceedings until after a month had elapsed.

The Court refused *to order the proceedings to be reopened.*

Marnewick v. Sapiero 487

8. **—— ——Act 20 of 1856, schedule B., Rule 29.**

The defendant in an action in the Court of the Resident Magistrate of Cape Town was not present on the day of trial, and judgment was given against him by default. An application to re-open the case, on the ground that the defendant's absence was caused by the fact that he kept a shop at Green Point, and had no one to leave in charge of it, having been refused by the Magistrate,

The Court *refused to interfere with the decision.*

Reyersbach v. Rodger's Executor 535

9. **——Summons—Act 20 of 1856, Schedule B, Rule 10—Magistrate's discretion.**

In an action for trespass brought in a Magistrate's Court the summons alleged that the defendant had committed a breach of a particular clause in an award of arbitrators which had been made a Rule of Court; the clause referred to was inserted in the summons. An exception to the summons having been allowed by

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the Magistrate on the ground that a copy of the award had not been served upon the defendant in terms of Schedule B, Rule 10 of Act 20 of 1856,

Held, on appeal, *that the Magistrate had a wide discretion under that rule, and that as he had exercised it in a judicial manner, his decision should not be interfered with.*

Kriel v. Kriel 412

Magistrate's Jurisdiction—Appeal—Tacit agreement—Arbitrator—Award—Prorogation or extension of jurisdiction.

The applicant sued the respondent in the Resident Magistrate's Court of Kokstad, and the respondent, who did not reside in the district, raised no objection to the jurisdiction. The decision being against the respondent he appealed to the Chief Magistrate, who altered the judgment, whereupon the applicant applied to the Supreme Court for an order to set aside the Chief Magistrate's judgment on the ground that, as the Court of first instance had no jurisdiction, its judgment was in the nature of an award and could not be appealed against.

Held, *that there was not sufficient proof of a tacit agreement between the parties to submit the dispute to the final award of the Magistrate of Kokstad, but that there was proof of an agreement to extend his jurisdiction, and that consequently the applicant, who had selected his* forum, *could not object to an appeal to the Supreme Court.*

The case of Riversdale Divisional Council v. Pienaar (3 Juta, 252) *was not intended to decide that parties to a suit might not by their conduct be held to have tacitly agreed to accept the Resident Magistrate as an arbitrator to finally determine a dispute between them.*

Oxland v. Key 356

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2. —— ——Arbitrator—Novation—Delegation.

In an action in a Magistrate's Court for £150, being the price of goods sold and delivered, no objection was taken to the jurisdiction, and judgment was given for the plaintiff for the full amount. On appeal *the objection was taken, but the plaintiff, being willing to accept £100 in lieu of the amount originally claimed,* the Court, *being satisfied as to the sale,* ordered judgment to be entered for £100.

Lambrechts v. Van der Byl ... 532

3. —— ——Future rights — Marriage action *in rem—Status—Res judicata.*

In an action in a Magistrate's Court for defamatory words uttered by the defendant to the effect that the plaintiff had been guilty of improper intercourse with other women than his wife, the summons alleged that the plaintiff was a married man. An exception was taken to the jurisdiction and upheld on the ground that future rights would be bound by a decision as to the marriage.

Held, on appeal, *that the exception was bad inasmuch as the action was not founded on the fact or validity of the plaintiff's marriage.*

The case of Renwaldsen *v.* Weiss (Buch. 1875, p. 108) *distinguished.*

Malherbe v. Grewe 102

4. —— ——

Lawrence v. Cape Town Town Council 114

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5. —— ——Ordinance 6 of 1843, sections 27, 28 — Reopening account.
Van Schalkwyk v. Pienaar's Trustees 329

6. —— ——Previous conviction.
The ordinary jurisdiction of a Magistrate is limited to a sentence of imprisonment for three months, even where the prisoner has been previously convicted.
Regina v. Plaatjes 347

Malicious arrest.
Carne v. Kerr's Agency... ... 270

Manager, authority of.
Dittler v. Kamp 457

Mandamus — Cape Town Town Council—Order to pass plans—Regulation 159—General line of buildings.

On an application by S. *to compel the Town Council of Cape Town to pass certain plans in connection with the erection of stores,*

Held, *that the Court could not make such an order unless it was suggested that there had been dishonesty or fraud or improper motives on the part of the Town Council.*

Semble, *that the proper course was an action to have it declared that the applicants were entitled to build notwithstanding the want of consent of the Town Council on the ground that it was illegally withheld and on improper grounds.*

Held, further, *that Regulation 159, which empowered the City Engineer to decide upon the general line of buildings in any street, road, &c., should not be applied in a general way but to each particular case, and that the City Engineer's decision should not be given without reference to any disputes, but should in each case be given in reference to the particular dispute.*
Short & Co. v. The Town Council of Cape Town 224

Marked Voters' List, *see* Parliamentary Election.

Marriage, Decision as to validity of —Future rights.
Malherbe v. Grewe 102

Marriage proved by duplicate certificate.
Brown v. Brown 395

Married woman—Power of Attorney.

The plaintiff, who was married by ante-nuptial contract, shortly after the marriage gave a power of attorney to the defendant, an attorney-at-law, to receive a certain inheritance which was due to her. Upon her suing him some time subsequently for the amount, the defendant alleged that she had authorised him by power of attorney to pay himself out of the inheritance certain sums which were due to him by her husband, but he failed to produce this power.

Held, *that the plaintiff was entitled to succeed.*

Held, further, *that even if proof of the plaintiff's consent were produced it would be necessary to prove also that she had had some independent advice.*
Hough v. Van Eyk 463

Master and servant—Act 15 of 1856, section 1.
Richmond v. Morgan Crofton ... 220

2. ——Act 15 of 1856, chap. VI., section 3.
Regina v. Rosser 224

3. ——Refusal to resume service—Departure from service—Wages — Remuneration – Letting and hiring of services—Mutuality—Contract of service.

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A servant cannot be convicted of the offence of departing from service for refusing to resume service after undergoing imprisonment under the Masters and Servants Acts.

Where a servant has been engaged for a fixed period the fact that the master has the option to employ the servant in the manufacture of certain articles at a certain sum for every thousand articles or to employ him in other work at fixed wages per diem does not exclude the operation of the Acts.

If, however, the servant has purported to let his services for a certain period without a reciprocal hiring of such services by the master for the full period, the criminal liability of the servant attaches only as long as the civil liability of the Master to employ him continues.

October and Others v. Rowe ... 132

4. ——Scope of employment—Negligence.

Priestley v. Dumeyer 525

Matabeleland Order in Council—Trial by jury.

Salisbury Reef G.M. Co. v. British South Africa Co. ... 443

Medical and Pharmacy Act, 1891—Remitting case for evidence to Magistrate's Court—Appeal—Condition precedent.

Where a statute requires proof of a particular fact as a condition precedent to a plaintiff's right to recover a charge in a Court of law and such proof is not given in a Magistrate's Court, the Supreme Court will not, on appeal, exercise its power of remitting the record to the Court below for the purpose of taking such evidence.

The plaintiff brought an action in a Magistrate's Court to recover his charges for medical attendance and for medicines supplied, but produced no proof of his being licensed to practise or to supply medicines. Absolution was asked for by the defendant, but the Magistrate gave judgment for the plaintiff.

Held on appeal *that the production of such proof at the trial was a condition precedent, under the 60th section of Act* 34 *of* 1891, *to plaintiff's right to recover his charges, and the judgment was accordingly altered into one of absolution from the instance.*

Louw v. Fryer 253

Messenger of the Magistrate's Court—Negligence—Damages.

The messenger of a Magistrate's Court having negligently failed to realise certain securities lodged with him in satisfaction of a judgment, and the judgment creditor having sustained damages in consequence, judgment was given against the messenger for the amount of the damages proved.

Lawton v. Wiseman 534

Mineral lease, *see* lease.

Minor—*Venia Aetatis*—Discharge from tutelage.

Where a minor was desirous of carrying on a trading business for himself and it appeared that he was entitled to a certain legacy under the will of his parents, which provided that such legacy should be paid to the children upon their "marrying, attaining majority or other approved condition," the Court refused to declare that he had attained majority, but upon satisfactory evidence being produced as to his capacity for business, granted an order authorising the payment to him of the legacy and declaring him discharged from tutelage.

Ex parte Cachet 9

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2. ——**Registration — Parliamentary Voters' Roll.**
Crewe v. Botha 424

Misrepresentation—Agency—Sale of land.

S. *employed* B., *a broker, to negotiate with a view to the purchase of certain property belonging to* F. B. *communicated with* F. *and through his agency a sale of the property to* S. *was concluded.* S. *afterwards repudiated the sale on the ground of misrepresentation in that she had been told by* F. *that there was only one lease on the property, which lease was for three years, whereas in fact the lease specified was for five years, and there was another lease which had still four years to run.*

Held, *that statements made by* F *to* B. *preliminary to the completion of the sale must be taken to have been made to* S., *but that there was nothing to show that any misrepresentation had been made by* F.

Fraser v. Solomon 22

2. ——**by auctioneer.**
Crews v. Zweigenhaft 193

3. ——
Robertson v. Ryves 414

Municipality—Mandamus—Order to pass plans.
Short & Co. v. Town Council of Cape Town 224

2. ——**Municipal Regulations.**
Dutch Reformed Church v. Cape Town Town Council 13

3. ——**Municipal regulations— Contravention—Name-plate — Onus of proof—Magistrate's jurisdiction.**

A Municipal Regulation prohibited the placing of any obstruction or projection against, or in front of any house or building, without the sanction of the Corporation. The appellant having erected a name-plate above the stoep of the premises which he occupied, objected to the jurisdiction of the Magistrate to try him for contravention of the regulation on the ground that the stoep was his private property, and that rights in future would be bound.

Held, *that the onus of proving his ownership lay upon the appellant.*

Lawrence v. Cape Town Town Council 114

4. ——**Municipal regulations— Conditions of sale—Interdict—Prescription.**

One of the conditions of sale upon which lots of land laid out for a township were sold by the owner of certain farms by public auction was that the purchasers should not be entitled to dig gravel, quarry stone, erect brick-kilns, or make and burn bricks upon the commonage or village lands without the consent of the owners. The conditions were duly registered in the Deeds Office. Subsequently a municipality was established in the township.

Held, *that a municipal regulation authorizing the Commissioners to grant permits to erf-holders to dig gravel, quarry stone and make bricks on the village lands did not legally justify the performance by the Commissioners of these acts without the consent of the plaintiffs to whom the original vendors had transferred the unsold portion of the farms together with all the vendors' rights in the village lands.*

Tarkastad Dutch Reformed Church v. Tarkastad Municipality 433

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5. ——Municipal Regulations — Builder—City Engineer's certificate—Costs.

The 117th Municipal Regulation of Cape Town provides that no new building shall be occupied until the City Engineer has certified that it is in accordance with the regulation.

Held, *that the builder of a new building who does not prevent the owner from occupying without such a certificate cannot for that reason be charged with a contravention of the regulation.*

Benning v. Town Council of Cape Town 249

6. ——Municipal regulations—*Ultra vires* — Brothel — Nuisance — Police.

The Cape Town Council, being authorised by Statute to make regulations for the purpose amongst others of "prohibiting brothels," framed a regulation imposing a penalty on "any person who keeps or manages or assists in the management of a brothel."

Held, on appeal against a conviction for keeping a brothel, *that the regulation was not* ultra vires.

De Fourd v. The Town Council of Cape Town 531

7. ——Municipal regulations—*Ultra vires*—Covering drain Costs—Private prosecution.

A Municipal Council established under Act 45 of 1882 has no power to make a bye-law compelling every householder from whose premises drainage water lawfully flows by a furrow into a public drain to provide a covering for such furrow on municipal land.

Oliff v. Worcester Municipality 242

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Mutual will—Massing of part of estate — Legacy — Condition—Life interest— Codicil —Construction.

Husband and wife by their mutual will instituted each other and their respective children as their heirs and directed that the survivor should pay out to such heirs on majority the portions due to them. By a codicil they made the following provision: "We sell the farm L to our sons for £500. The abovementioned £500 shall be paid to our daughters after the death of the survivor."

Held *that the sons were not entitled on the death of the testator to claim the whole or part of the farm on giving security for the £500 but that according to the true construction of the codicil the testatrix was entitled to retain a life interest in the whole farm and only after her death could the sons claim the farm subject to the payment by them of the provision made for the daughters.*

Schoombie v. Olivier 196

Native locations.

Kama and Others v. Colonial Government 57

Negligence—Contributory negligence—Intervening act of third party—Effective cause of damage—Master and servant—Scope of employment.

In an action for damages caused by the negligence of a cabdriver in running over the plaintiff, it was found that the plaintiff had been guilty of some negligence, but that the driver could with ordinary care have avoided the accident.

Held, *that, as there was an immediate connection between the driver's negligence and the damage, the plaintiff was not debarred by his own negligence, which in a* *remoter degree contributed to the accident, from recovering for the damage.*

The accident took place while the cab was being actually driven by a person who had taken the cab at the stand as an ordinary passenger, but had afterwards been allowed by the driver, who was the defendant's servant, to drive the horse, while the driver occupied a seat inside.

Held, *that the negligence of the driver in handing the reins to an incompetent person was the effective cause of the accident, and that the defendant was liable.*

The accident having taken place during a time when, and at a place where, the servant was employed on his master's business,

Held, *that the fact of no charge having been made to the passenger did not relieve the master from liability.*

Priestly v. Dumeyer 525

2. ——Tramcar.

Jacobson v. City Tramway Co. 376

Occupier—Act 40 of 1889, section 17, sub-section 8—Manager—Servant.

O'Brien v. Christian and others 327

Onus of proof—Contravention of Act 29 of 1896, section 31.

Regina v Hudson 324

Ordinance 6 of 1843, *see* Insolvency.

2. ——104, sections 21, 22, 23—Appointment of executor.

The Master of the Supreme Court is not bound to appoint as executor of an estate the person selected as such at a meeting of heirs and next-of-kin, but may use his discretion in the appointment.

In re Pisani 538

Overlap.

Hugo v. Russouw and Others ... 187

Paid agents, voting by.

Crewe v. Botha 424

Parliamentary Election — Franchise and Ballot Act, 1892—Colonial Secretary — Counterfoils of ballot papers — Marked voters' lists—Order of inspection.

It is not competent for the Colonial Secretary to obtain a general order for the opening of sealed packets of counterfoils in his custody, but the parties interested in the particular election in respect of which it is desired to open any sealed packet, should make the application to the Court.

Ex parte Smart 326

2. —— ——Sealed packet of counterfoils—Marked Voters' Lists — Order to open and inspect.

A defeated candidate at a Parliamentary election may apply without notice for an order authorising the opening of the sealed packet of counterfoils and taking therefrom the marked list of voters for the purpose of inspection.

Upon such an application the Court authorised the Registrar of the Court, after due notice to and in the presence of the petitioner and the successful candidates or their respective agents, to open the sealed packets and counterfoils and take out the marked lists of voters for the inspection of the parties.

It was further ordered that the packet of the counterfoils should be again sealed and handed to the Colonial Secretary for custody and that the marked lists of voters, after being inspected by the parties, be also handed to him for public inspection.

Ex parte Faure and others ... 336

3. —— ——Inspection of rejected ballot papers — Inspection of counterfoils — Polling Officers' statement—Marked voters' list.

On the application of an unsuccessful candidate, who was not present

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at the counting of the votes, authority given to the Registrar of the Court, after due notice to and in the presence of the parties or their agents, to open the sealed packet of rejected ballot papers and allow such parties or agents to inspect (but not to touch) the same in such a manner that the backs could not be seen.

On the like application authority given to the Registrar, in any case where he is satisfied that a discrepancy exists between the number of ballot papers appearing from the polling officer's statement to have been placed in the ballot box and the number marked off as having voted on the marked voters' list, to inspect the counterfoil, and compare the same with the marked voters' list.

Palmer v. Molteno 351

4. ——Election petition, *see* Election petition.

Partnership— Building society, *see* Building society.

2. ——Liquidating partner.
Solomon v. Wolff 519

3. ——Receiver—Increase of powers by Court.

Where partners had appointed a receiver to wind up their business and under the deed of dissolution he was empowered inter alia *to adjust and settle debts due by the firm with the consent of the partners, and disputes arose between the partners as to whether certain claims were private or partnership debts, and one of the partners applied for the appointment of an official liquidator, the Court refused the application but by consent gave power to the receiver to pay claims without the consent of the partners.*

Chabaud v. Pagden.—*Re* Chabaud and Pagden in liquidation 311

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Party-wall—Building— Condition — Breach.

The plaintiff consented to the defendant building on his half of a common wall between their respective properties, on condition that the top of the wall should be left "free for still further building if hereafter found necessary." The defendant after completing the wall, and without the plaintiff's knowledge, placed upon the top of it a guttering and a parapet, each covering one-half of the wall.

Held, *that the plaintiff, upon discovery of these constructions, was entitled to an order for their removal, and the completion of the wall in accordance with the condition.*

Mahomed v. Taliep 419

Pasturage, *see* Grazing right.

Pauper cases—Divorce.

It is not the practice of the Court to grant leave to sue in forma pauperis *for divorce unless the applicant appears in person.*

Bacela v. Bacela 99

Periculum rei venditae.
Fisher v. Harrison 43

Photographs — Evidence in divorce proceedings.
Kaye v. Kaye 194

Pleading, amendment of.
Poole v. Bawden's Estate ... 134

2. ——*Res judicata—Lis alibi pendens.*
Wolff, N.O. v. Solomon ... 340

Post—Direction of letter of demand.
Goustyn v. Van Putten ... 35

Post-nuptial registration of antenuptial contract.
Ex parte Houghton and wife ... 11

2. —— ——
Ex parte Glass and Glass ... 317

Pound—Unlawful impounding.
Froneman v. Petzer 26

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Power of Attorney—Magistrate's Court—Appearance—Act 20 of 1856, Sch. B. Rule 13.

K. *upon his departure from the Colony left a "special power of attorney" by which he purported to appoint* A. *"as my lawful attorney and agent, in my name, place, and stead, to the Resident Magistrate's Court to appear and then and there, as my act and deed and generally, for effecting the purposes aforesaid, to do or cause to be done, whatsoever shall be requisite," etc., without stating for what purposes or in what actions* A. *should appear.*

Held, *that this power was too vague to entitle A. to appear in the Magistrate's Court of Cape Town to defend an action for ejectment instituted against* K. *in his absence.*

Kaffoor v. Kaiser 202

2. ——to sue—Magistrate's Court.

The defendant's agent in a Magistrate's Court took exception to the power filed by the plaintiff's agent, which authorised the latter to take proceedings against the defendant but was headed "in the Supreme Court."

Held, *affirming the Magistrate's decision, that the exception was a good one.*

Kark v. Kremer 42

Practice — Immovable property — Execution.

Order for attachment of immovable property in execution granted simultaneously with judgment, a return of nulla bona *having been made to a previous execution by another judgment creditor.*

Walker v. Truter's Executors ... 118

2. ——Order of ejectment granted under Rule 329D.

Bell v. Locke 230

3. ——Pauper divorce cases.

Bacela v. Bacela 99

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4. ——Rehabilitations, *see* Rehabilitation—Practice.

5. ——Removal of bar.

Stiglingh v. Rhodes 373

6. ——Rule of Court 329D—Service—Return.

*Judgment granted under Rule 329*D *upon a summons which claimed the sum of £12 as the value of a ring belonging to the plaintiff lost or mislaid by the defendant.*

Warmsley v. James 149

7. ——Summons—Joint-debtors.

S. *was sued in a Magistrate's Court for one-third of an amount, the whole of which was stated by the account annexed to the summons to have been advanced to him and two others, jointly as well as severally. An exception to the summons on the ground that the action was improperly brought and should have been against the three parties for the full amount,* Overruled on appeal, reversing the decision of the Magistrate.

Moss v. Shipley 536

Presentment for payment, proof of.

Spangenberg v. G. Findlay & Co. 150

Principal and Agent—Authority.

The defendant in ordering goods from the plaintiffs gave the name of B., *as the person to be charged with the price.* B., *who had not in fact authorised the defendant to act as his agent, repudiated liability. The plaintiffs then attempted to obtain the price from the* T. Co., *for whom the goods had been bought but upon that Company being unable to pay sued the defendant.*

Held, *that he was liable.*

Wright *v.* Williams (8 Juta, 166) *approved.*

Orsmond & Co. v. Christian & Co.... 384

2. ——Manager — Authority — Evidence—Powers of Attorney—Contract to supply fish.

The plaintiff purchased a fishmongery business belonging to S. *at Kimberley.* S. *was at the time indebted to the defendant in a sum exceeding the purchase price and it was agreed through* M. *who in so far acted for the defendant, that promissory notes for the purchase price should be made by the plaintiff payable to the defendant.*

M. *was the manager of the defendant's branch fishmongery business at Port Elizabeth, holding certain written powers from him, and at the time of the sale he entered into an agreement binding both the defendant's business at Cape Town and the branch business at Port Elizabeth to supply the plaintiff, and no one except him, with fish at Kimberley. This agreement however was made subject to confirmation by the defendant, and this confirmation was not obtained.*

Held, *that this agreement did not come within the scope of* M.'s *ordinary powers as manager, and as it was not included in his written powers it was not binding upon the defendant.*

Semble, *the sale of* S.'*s business and the agreement to supply fish were perfectly distinct contracts and even if the defendant were liable on both the failure to perform the latter would not entitle the plaintiff to recover the consideration for the former contract.*

Dittler v. Kamp 457

3. ——Mandate --Authority—Broker —Sale and purchase—Price.

A broker having negotiated the sale of a stand drew a bill upon the purchaser (payable to the Savings Bank) with the consent of the seller's lawful attorney, who gave to the bank the transfer deed in favour of the purchaser, with instructions to hand over the same to the purchaser upon payment by him of the bill.

Held, that *whether the broker acted as the agent of the purchaser or of the seller in effecting the sale the conduct of the seller's attorney was a sufficient authority for the payment of the price to the broker.*

Held, further, affirming the judgment of the High Court of Matabeleland, that *the purchaser, after payment of the amount of the bill to the bank and delivery to him of the transfer deed, was not liable to the seller for such portion of the price as the broker failed to pay over.*

Acutt & Crewe v. Liley... ... 173

Private prosecution—Costs.

Oliff v. Worcester Municipality 242

Promissory note payable on demand—Letter of demand—Post—Direction—Tender—Costs.

A demand by post for the payment of a promissory note payable on demand, should be by letter, prepaid and properly directed, and the direction is not complete if only the name of the farm on which the maker resides is given, and not the post-office nearest the said farm or the post-office at which the maker usually receives his letters.

Goustyn v. Van Putten 35

Promoter of company—Contract—Exception.

Marshall v. African Banking Corporation 401

Provisional sentence—Purchase price of land—Misrepresentation by auctioneer.

The Court refused to grant provisional sentence on a summons claiming the purchase price of

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certain land which had been sold by public auction, the auctioneer representing that the land was near Retreat Station, whereas as a fact it was four miles distant.
Crews v. Zweigenhaft 193

2. ——Stay of execution.
Where the plaintiff sued upon a liquid document, but the defendant set up a counterclaim, the Court granted provisional sentence but stayed execution for one month in order that an action might be brought if desired.
Toe v. Jolly 246

Public seal.
Kama and Others v. Colonial Government 57

Public stream, *see* Water-rights.

Purchase and Sale, *see* Sale.

Railway Department—Non-delivery of goods - Negligence—Fraud.
S. *sued the Colonial Government for the delivery of a case of drapery, or its value* £110 17*s*. 6*d*, *handed to the Railway Department for conveyance to Laingsburg on the* 18*th June*, 1897.
The Department admitted the receipt of the case but denied its contents and value, and specially pleaded fraud on the part of the plaintiff in that after he had handed over the case to the Department he removed it from the Cape Town goods yard, and so rendered the performance of the contract impossible.
There was no direct evidence that the plaintiff had removed the case from the goods yard, but there was clear evidence that he had attempted to induce certain persons to swear that they had seen him buy the goods on the Cape Town Parade, and that he had tried to induce a draper's assistant to give him a receipt for some of the goods.
Held, *that the plea of fraud had been sufficiently established.*
Shortle v. Colonial Government 14

Railway-station, Sale of liquor at.
Regina v. Truman 99

Receiver, *see* Partnership.

Reductie, *see* Arbitration.

Registration of ante-nuptial contract after marriage.
Ex parte Glass and Glass ... 317

2. —— ——
Ex parte Houghton and wife ... 11

3. ——of company—Mistake.
Ex parte Holt and Holt, Ltd.... 517

4. ——of servitude, *see* Servitude.

5. ——of Trade mark, *see* Trade mark.

Rehabilitation—Practice.
Re Friedman's Insolvent Estate 11

2. —— ——
The Supreme Court will not entertain an application for the rehabilitation of an insolvent whose estate has been sequestrated by the High Court of Griqualand, until certified copies of the proceedings in insolvency have been handed over to the Registrar of the Supreme Court.
Ex parte Isenberg 126

3. —— ——Balance-sheet.
Notwithstanding the repeal of Acts 15 of 1859 and 15 of 1867, the rules of Court framed under the former Act which require an insolvent applying for rehabilitation to file a balance-sheet are still in force.
Ex parte Helm 213

Release by person deceased—*Acceptilatio*—Executors.
Where the debtor of a deceased person relies upon a document

executed by the deceased as a release from the debt, the executors, unless clearly satisfied on sufficient evidence that a release was intended, are justified in suing the debtor.

An agreement to release a debt when clearly established is a good defence to an action brought by the executors of the creditor for the recovery of the debt from the debtor.

Van der Poel's Executors v. Malan 83

2. — — —— Promissory notes — Amendment of liquidation account.
Roux v. Nel 381

Remittal to Magistrate's Court for further evidence refused.
Louw v. Fryer 253

Removal of trustees.
Re Van Wyk's Insolvent Estate 89

Re-opening case, *see* Magistrate's Court.

Rent—Non-payment for two years—Cancellation.
Johns v. Colonial Government 290

Res judicata—Plea of *lis alibi pendens* — Foreign judgment — Foreign suit.

The fact that a suit has been commenced by a plaintiff and is still pending in the Court of a foreign State having jurisdiction over the defendant, affords prima facie *a good ground for a plea in abatement to an action instituted in the Supreme Court of this colony by the same plaintiff against the same defendant for the same thing, and arising out of the same cause, in the absence of proof that justice would not be done without the double remedy.*

Wolff, N.O., v. Solomon ... 340

Restitutio in integrum — Payment under protest, *see* Diamond mine 153

Restraint of trade—Husband and wife—Divorce—Interdict.

The respondent's husband, to whom she was married in community, sold to the applicants the goodwill of their general dealer's business in the district of T. for £500 and it was a condition of the sale that the seller should abstain from transacting or being interested directly or indirectly in any business in the district for ten years.

Held *that the respondent, after being divorced from her husband on the ground of his adultery, could not be restrained from carrying on a business in her own name and on her own behalf in the said district.*

Merrington and Adams v. Welt 355

Review of valuation.
Dutch Reformed Church v. Town Council of Cape Town 109

Right to sue, Lessee's.
Theron v. Nieuwenhuizen ... 27

Riparian Proprietor, *see* Water rights.

Rule of Court 8, *see* Arrest.

2- ——308 (a).
Weir & Co. v. Colonial Government 409

3. ——329 (d).
Warmsley v. James 149

4. ——329 (d)—Ejectment.
An order of ejectment may be granted upon a summons under Rule 329D.
Bell v. Locke 230

Sale—Cancellation.
Haarhoff and Others v. Smith and Gerber 440

2. ——Misrepresentation—Agency.
Fraser v. Solomon 22

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3. ——Payment of purchase price—Broker.
Acutt & Crewe v. Liley ... 173

4. ——of house—Authority of broker to purchase.
Glennie v. Schwalbe 209

5. ——Specific goods — *Periculum rei venditae*—Interdict.
In the absence of fraud the purchaser of goods, for future delivery, which have not been pointed out to him or set apart for him is not entitled to an interdict restraining the seller from removing from his premises goods of the same kind as those so purchased from him.
Fisher v. Harrison 43

6. ——Written contract—Evidence—Specific performance.
V. *and* W. *agreed to the sale of certain land by* V. *to* W. *upon certain conditions. The agreement was written in pencil and signed by both parties, and contained the following clause; "A contract to be properly drawn up and shall be signed by the parties to-morrow." The following day* W. *tendered for* V's. *signature another document to the same effect as the first, but framed in more formal language and written in ink. In an action for specific performance of the contract,*
Held, *that* V. *could not adduce evidence of any conditions inconsistent with the written agreement.*
Held, further, *that the first document was binding and* V. *be ordered to duly execute the formal contract or pay damages.*
Van der Westhuizen v. Velenski 273

Security, *see* Appeal.

Sentence of Court of Officers—Act 32 of 1892, section 71.
Hatherell and Others v. Sprigg, N.O. 215

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2. ——of Magistrate's Court.
Sentences passed by a Magistrate which were from their form concurrent made successive on review.
M.C. Case 125

Servant—Act 48 of 1882.
Regina v. Daniel Smith... ... 406

2. ——*see* Master and servant.

Service of summons, *see* Summons.

Servitude.
De Klerk v. Niehaus 2

2. ——Pasturage — Registration — Respective rights of owners of dominant and servient tenements—Grazing cattle and sheep—Municipal regulations.
The owner of a farm having sold certain lots or erven for a village and at the same time granted to the erfholders the right to graze their cattle on certain defined pasture land "without any hindrance of any kind,"
Held, in an action brought by the Commissioners of the Municipality of the village against the grantor's successor in title:
(1) That the defendant, having bought with full knowledge of the servitude, was bound to allow its registration against his title;
(2) That he was not entitled to depasture more of his own cattle than would leave sufficient pasturage for a reasonable number of cattle of the erfholders, and
(3) That to such reasonable number cannot be added cattle belonging to others than erfholders notwithstanding the existenee of a Municipal regulation authorising the issue of grazing licences to strangers.
Heidelberg Municipality v. Uys 178

Signature, *see* Will.

Slander—Defamatory words.
The following words "I saw him last night in my yard fiddling

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round a box of eggs" *are capable of meaning that the person of whom they were spoken was stealing, and are therefore defamatory.*
Caples v. Riedel 411

2. ——Privileged occasion.
Strasburger v. Orpen 315

Spare diet.
Where consecutive sentences exceed three months no spare diet can be ordered.
Magistrate's Court Case ... 353

Specific performance—Contract of sale.
Van der Westhuizen v. Velenski 273

Statutory duty—Non-feasance.
B.S.A. Company v. Salisbury Reef Gold Mining Co. 447

Summons — Service — Magistrate's Court—Re-opening judgment—29th rule of Magistrates' Courts.
In a proceeding in a Magistrate's Court for re-opening a judgment, under the 29th Magistrate's Court Rule, on the ground that, having been duly summoned, the applicant was by just and reasonable cause prevented from attending the Court in pursuance of the summons, the question to be determined was whether the applicant had notice of the summons before the day of trial. The Magistrate held, on the evidence, that the applicant had such notice and refused to allow the judgment to be re-opened. On appeal the objection was raised that the original summons had not been duly served.
Held *that this objection could not now be raised, and that as the evidence satisfied the Court that the summons had come to the appellant's notice before trial, he was not entitled to have the judgment re-opened.*
Cortes v. Filby 105

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2. ——Service—Return.
Warmsley v. James 149

3. ——in Magistrate's Court.
Kriel v. Kriel 412

4. ——*see* Practice.

Survey expenses—Act 37 of 1882.
Van der Merwe v. Colonial Government 106

Tender.
Crooks and Co. v. Murray ... 310

Theft—Evidence.
Regina v. Raxi and Others ... 101

2. ——Evidence sufficient to convict.
Regina v. Nel 534

3. —— ——
Regina v. Leonard 407

Town Council of Cape Town - Regulation 159 — General line of buildings.
Short & Co. v. Town Council of Cape Town 224

Trade Mark—Descriptive words—Act 12 of 1895.
The words "Café Noir" as applied to biscuits are not registrable as a trade mark, inasmuch as they are descriptive and do not in any respect satisfy the requirements of Act 12 of 1895, section 2.
Peek, Frean & Co. v. Carr & Co., Ltd. 207

2. ——Infringement—Interdict.
Lever Brothers (Limited) v. The Star Perfumery and Soap Co. ... 231

3. ——Registrar of Deeds—General rules—*Ultra vires.*
One of the General Rules framed by the Registrar of Deeds under the section 7 of Act 22 of 1877 *provides that an objection to the registration of a trade-mark shall be deemed to have been abandoned*

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unless the person objecting proceeds within a certain specified time to have the objection set aside by a competent Court.

Held, *that such a provision is* ultra vires *except in the case of several persons claiming to be registered as proprietors of the same trade-mark.*

The Section 1 of the Act does not prohibit proceedings in the Supreme Court to prevent the registration of a mark not falling within the legal definition of a trade-mark but such proceedings should not, as a general rule, be taken until the Registrar has decided upon the application for registration.

Koch & Dixie v. Avenarius and another 232

4. ——Special and Distinctive word —Registration—Disclaimer.

The word Royal is not such a special and distinctive word as would, if used as a trade mark before the passing of Act 22 of 1877, *be registrable under that Act.*

The fact that goods with the label containing the word Royal were from time to time consigned from the United States to Natal, does not constitute sufficient proof that the word was "used as a trade mark" in terms of the Act.

Wright, Crossley & Co. v. Royal Baking Powder Company ... 11

Tram-car—Negligence—Damages.

Where the plaintiff was in the act of mounting a tram-car, and had one foot on the step but before he had time to lift the other foot was thrown to the ground owing to the tram moving off suddenly, the owners of the tram-car were held liable for the injuries sustained by the plaintiff.

Jacobson v. City Tramway Company 376

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Tramway Act—Act 29 of 1896, sections 2, 31, 32—Onus of proof.

H. *was found guilty of contravening Act* 29 *of* 1896, *section* 31, *by wilfully obstructing a tram car at a certain siding or passing place. Section* 2 *of the Act provided that no passing place should be constructed except at places approved of by the road authority and by the Municipal Council.*

Held, on appeal, *that the onus of proving the illegality of the car being at that particular siding place lay upon* H.

Regina v. Hudson 324

Trespass—Damages.

Malcolm v. Shaw 34

2. ——Pumping water—Damages.

Wolfaard v. Colonial Government 429

Trial by jury—Matabeleland Order in Council—Introduction of law—Abrogation by disuse.

Section 26 of the Matabeleland Order in Council of 1894 introduces into that country the law of the Cape Colony "as nearly as the circumstances of the country permit."

Held *that the circumstances of the country at the date of the Order in Council must be looked to, and that consequently, even if trial by jury in civil cases became practicable with the subsequent development of the country, it cannot be held to have been introduced by the Order in Council if impracticable at the date of such order.*

Semble: *If the law relating to trial by jury had been introduced by the Order in Council the fact that the law was never observed for four years would not prove that it had been abrogated by disuse.*

Salisbury Reef Gold-Mining Co. v. British South Africa Co. ... 443

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Trustee—Removal of.
Re Van Wyk's Insolvent Estate 89

Tutelage—Discharge from.
Ex parte Cachet 9

Ultra vires—Municipal regulations.
Oliff v. Worcester Municipality 242

2. —— ——
De Fourd v. Town Council of Cape Town 531

3. ——Rules as to registration of trade mark.
Koch & Dixie v. Avenarius and another 232

4. ——*see* Building Society.

Undue preference—Ordinary course of business—Sale of goodwill by lessee of public-house—Payment to landlord.

Rowland's Trustees v. Ohlsson's Cape Breweries 449

University Incorporation Amendment Act, *see* Advocate.

Valuation—Municipality—Appeal—Rates.
Under the 92nd section of Act 26 of 1893, an owner or occupier of land in Cape Town, who has duly lodged an objection to a valuation as originally made by the valuer, may apply to the Supreme Court for the review of a decision of the Valuation Court upon such objection, and the Supreme Court may reduce the valuation, if it is clear that the valuation was excessive and was duly objected to.
Dutch Reformed Church v. Town Council of Cape Town 109

Venia Aetatis.
Ex parte Cachet 9

Voters' Roll—Divisional Council—Expunging name after completion.
O'Brien v. Christian and others 327

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2. —— Parliamentary — Conclusiveness.
Crewe v. Botha 424

Water, diversion of — Overflow — Damages.
Where the defendant for the purpose of draining his land directed the flow of water from its natural channel, and by so doing caused an overflow upon the plaintiff's land.
Held, *that the defendant was liable for the damage caused by the diverson.*
Kohne v. Harris 501

2. —— Pumping — Trespass — Damages.
Wolfaardt v. Colonial Government 429

Water rights.
Krynauw and another v. Wium 281

2. —— Obstruction of stream —Injunction—Damages — Divisional Council.
By the authority of a Divisional Council, one of its members constructed a wall of stone and bushes in the channel of the Orange River immediately above the outflow of a smaller stream which was a public and perennial watercourse. The object of the construction was to divert back to the main channel of the river a portion of the water, all of which was then passing through the outlet, but part of which used to flow down the main channel until a few years previously, when its course had been changed by natural causes. The result of the construction was the formation of a sand bank, which in a few years blocked up the outlet, and entirely cut off the water supply of the plaintiff, a riparian proprietor on the smaller stream.
Held, *that the Divisional Council were responsible for the damage*

PAGE

necessarily suffered by the plaintiff in consequence of the obstruction, but not for such increased damages as were occasioned by his delay in taking action to have it removed.

Held, further, *that an injunction should be granted ordering the Council to remove the obstruction and restore to its former course so much of the water as had formerly flowed down to the plaintiff.*

McGregor v. Divisional Council of Clanwilliam 389

3. —— ——Public stream — Servitude—Prescription --Irrigation —*Aquæductus.*

The acquisition by a lower proprietor of a servitude by prescription of leading out all the water at a particular dam in a public stream by means of a furrow on an upper proprietor's land does not deprive such upper proprietor of his natural right to take a reasonable share of the water above the dam for the purpose of irrigating his land situated at a lower level than such dam, but in estimating such reasonable share the existence of the servitude must be taken into consideration.

De Klerk v. Niehaus 2

4. ——Riparian proprietors—Reasonable share—Irrigation—Mill.

Independently of prescription the right of a riparian owner to use water in a perennial stream for mechanical purposes is subject to the prior right of other riparian owners to the reasonable use of the water for agricultural purposes.

De Kock v. Le Roux 297

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5. —— —— Reasonable share — Diminution of stream — Unreasonable use by third party—Abatement—Damages.

The defendants who were upper riparian proprietors on the B. River, a public and perennial stream, diverted and used for purposes of irrigation sufficient water to cultivate their own farms, but by so doing deprived the plaintiffs who were lower proprietors, of the beneficial use of the water for domestic purposes and for stock. The defendants maintained that they did not use more water than they had been in the habit of using for a period of more than thirty years and upwards, but said that the water in the river had decreased in volume, owing partly to natural causes and partly to the action of the riparian proprietors immediately above the defendants themselves.

Held, *that the defendants used more than their reasonable share, and that if from any cause the river reached them in reduced volume but still in sufficient quantity to retain its character of a permanent stream, all the riparian owners should abate their use and share the benefits as before.*

Du Toit and Others v. Potgieter and Others 467

Will—Codicil—Construction.

Schoombie v. Olivier 196

2. ——Construction—Bond.

Re Meiring's Estate 311

3. ——Execution—Witnesses — Signature—Obliteration.

A witness to a will, who was unable to write, held the pen at the top, whilst another person

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wrote the name of such witness. It was proved to the satisfaction of the Court that the transaction was bonâ-fide *and that the witness held the pen with the object of thus attesting and subscribing the will.*

Held *that his attestation was valid.*

After the due execution of the will the person who had drawn it struck out the name of the testator appearing after the testator's mark and induced a third witness to attest the will. This was done without the testator's knowledge.

Held *that the irregularity thus introduced did not affect the validity of the will.*

Van Niekerk v. Van Niekerk ... 238

Winding-up, *see* Building Society.

Witnesses, *see* Will.

Writing, contract in.
Richmond v. Morgan Crofton ... 220

CASES DECIDED IN THE SUPREME COURT,

CAPE COLONY.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS (Chief Justice) and Mr. Justice MAASDORP.]

ADMISSIONS.

1898.
Jan. 12th.

On the application of Mr. Buchanan. Mr. Gysbert Joubert Reitz was admitted as an attorney and notary.

On the application of Mr. Buchanan, Mr. William Stewart Blacker was admitted as an attorney.

On the application of Mr. Gardner. Mr. Charles Friedlander was admitted as an attorney and notary.

PROVISIONAL ROLL.

VAN DYK AND COLE'S ASSIGNEES V. LOUW.

Mr. Currey applied for provisional sentence on a promissory note for £481, with interest from the 1st February, 1896, with costs.

Granted.

PIENAAR'S TRUSTEES V. PIENAAR.

Mr. Buchanan applied for the final adjudication of the estate of the defendant.

The application was granted.

S.A. MILLING COMPANY V. COX AND CO.

Mr. Buchanan applied for the final adjudication of defendants' estate.

Mr. Graham, for the respondent, applied for a postponement of the case, as an offer of a compromise was under the consideration of the creditors.

The order for final adjudication was granted.

MILLS V. HAUPT AND HAUPT.

Mr. Buchanan applied for judgment under rule 319 for costs of action, less £8 10s. 6d., which had been paid on account.

The application was granted.

BEHR AND LOBETSKY V. CURRIE.

Mr. Buchanan applied under rule 329 for £28 11s. 7d., for goods sold and delivered.

Granted.

HALL AND CO. V. THERON.

Mr. Buchanan applied under the rule 329 for the sum of £30 8s. 10d., for goods sold and delivered.

Judgment accordingly.

VAN DER BYL AND CO. V. KOONGONG.

Mr. Jones applied under rule 329 for £31 18s. 5d., for goods sold and delivered.

Judgment accordingly.

VAN DER BYL AND CO. V. KLEYN.

Mr. Currey applied under the rule 329 for £62 4s. 1d., for goods sold and delivered.

By the consent of the plaintiffs, execution was stayed for a fortnight.

MADDEN V. POOLE.

Mr. Currey applied for judgment under rule 329 for £5,250, balance of the purchase price of a plot of ground at Rondebosch, with interest and costs.

Judgment accordingly.

GROVE V. S.A. SALTPETRE FIELDS COMPANY, LIMITED.

Mr. McGregor applied for judgment for £83 6s. 8d., for rentals of mineral rights over a farm in the division of Prieska.

Judgment accordingly.

DEELMAN V. SPARSIE'S ESTATE.

Mr. Joubert applied for judgment under rule 329 for the sum of £25 4s. 9d., being taxed costs awarded in legal proceedings in the South African Republic, with interest *a tempore morae*.

Judgment accordingly.

REHABILITATIONS.

Mr. Gardiner applied for the rehabilitation of Theunis Johannes Marthinus van Niekerk,

Granted,

Mr. Buchanan applied for the rehabilitation of Richard Henry Stanley.

Granted.

Mr. McGregor applied for the rehabilitation of John Robson Ivy.

GENERAL MOTIONS.

DUTCH REFORMED CHURCH V. THE CAPE TOWN TOWN COUNCIL.

This was an application to have an award of arbitrators made a rule of Court.

Mr. Innes, Q.C. (with him Mr. Graham), appeared for the applicants; and Mr. Schreiner, Q.C. (with him Mr. McGregor), for the respondents.

Mr. Schreiner applied for a postponement to allow the Town Council to consider the question.

Mr. Innes opposed the postponement.

The Chief Justice asked what prejudice would it be to his clients if the case were postponed.

Mr. Innes replied that the matter had been hanging on for two years, to the loss of revenue to the Church, and his clients were naturally anxious to have the matter settled as soon as possible. They took up the award and gave notice to the other side. The Town Council did not say that they were going to resist the award, but they simply said that they wanted time to consider their position. He submitted that in the interests of all parties the question should be settled forthwith. Notice was given the other side verbally on the 6th inst. of their intention to apply to the Court on the 12th, and he submitted that they had had ample time to place their defence before the Court.

The Chief Justice asked what was the amount of the award.

Mr. Schreiner replied that it was for £19,000 without interest, besides which there was a further sum and which was still undetermined.

The Chief Justice said that the Court would postpone this application until the 1st February. The amount of the award was a very large one, and they must bear in mind that they were dealing with a public body which could not be expected to come to a decision with the same rapidity as an individual. At the same time he would suggest that the respondents should consider whether it would be worth while incurring further expense for the purpose of opposing the award, if the opposition was to proceed merely on the ground that the amount of the award was excessive. It was exceedingly difficult for the Court to refuse to give effect to the award merely on the ground that it was considered excessive.

Mr. Schreiner replied that that certainly would not be the only point which would be brought before their lordships' notice.

HARRIS V. HARRIS.

Mr. Graham applied for a decree of divorce. An order for restitution of conjugal rights had been granted, with which the defendant had failed to comply.

The order was granted.

OPPEL V. OPPEL.

Mr. Buchanan applied for a decree of divorce on the ground of the defendant's failure to comply with the order of Court for restitution of conjugal rights.

The order was granted.

DE KLERK V. NIEHAUS.

1898.
Jan. 12th.
„ 13th.

Public stream—Servitude—Prescription—Irrigation—*Aquæductus.*

The acquisition by a lower proprietor of a servitude by prescription of leading out all the water at a particular dam in a public stream by means of a furrow on an upper proprietor's land does not deprive such upper proprietor of his natural right to take a reasonable share of the water above the dam for the purpose of irrigating his land situated at a lower level than such dam, but in estimating such reasonable share the existence of the servitude must be taken into consideration.

Mr. Innes, Q.C. (with him Mr. Schreiner, Q.C.), applied for an interdict restraining the respondent from taking and using certain water in the Dorp River, in the division of Tulbagh.

Mr. McGregor, for the respondent, applied for an adjournment in order to file answering affidavits.

Mr. Innes said the matter was one of urgency to his clients, and opposed the application. The parties were farmers, owning land near Tulbagh, through which a stream of water ran. His contention was that the respondent took water from a dam to which he was not entitled.

The Chief Justice stated that the case had been before the Court for a long time, heavy costs had been incurred, and he did not see any advantage to be gained by a further postponement. The respondent had made a clear disclaimer of the right to use all the water.

The affidavits were then read.

The applicant's affidavit set out that in August, 1897, he had brought an action against the respondent, having reference to water rights, and obtained judgment in his favour. (See page 294, *supra.*) The Court then ordered that the plaintiff was entitled to the use, from 15th October to the 15th March, of the whole of the water flowing in the Dorp River at the dam on Holle Sloot, marked G on plan A, and that he was entitled to divert the said water by means of the furrow leading from the said dam over the farm Holle Sloot on to the farm Straatskerk. The Court further interdicted the defendant from diverting any water from the said furrow during any portion of the year, and ordered him to pay £10 damages and costs.

The applicant further alleged that the respondent could not pay costs, and he had had to compromise and take ten shillings in the pound. He complained that the respondent had made a dam on municipal ground above the dam G, and that from this dam the water was being conducted from the river in a furrow on the side opposite to the side on which applicant's furrow ran, and then by an aqueduct across the river, and thence by a furrow parallel to applicant's furrow to the gardens on respondent's farm below the dam G; these were the same gardens which, previously to the action, the respondent had irrigated by means of water taken from applicant's dam. The consequence was, that practically no water reached dam G. By this means the respondent was practically evading the judgment of the Court.

No affidavits were filed in answer to the allegations above set out, but a letter from the respondent's attorney was put in disclaiming any right to more than a reasonable share of the water.

Mr. Innes: We come to the Court on motion because we cannot get costs out of the respondent. The effect of the judgment is that the respondent can only use the water to irrigate the lands above the dam and not those below. Otherwise we have got a barren judgment; the Court cannot have intended to give us a barren judgment. We created a servitude by adverse user; the respondent having lost his natural rights cannot restore them by artificial means. This case must be distinguished from *Jordaan* v. *Winkelman* (1879, p. 79). There are no lower proprietors to be considered. By the judgment of the Court of Landdrost and Heemraden the water was distributed between the proprietors of the whole farm. The owner of the land below the dam is not in the position of a riparian owner at all; as far as he is concerned, there is no Dorp's River at all since the applicant has the right to take all the water: the land has ceased to be riparian and he cannot take water to it from this river. The water after use must be allowed to return to the river above the dam; the applicant is entitled to the *afluk*.

[De Villiers, C.J.: Could not the respondent use all the water in the upper lands in such a way that there would be no *afluk*?]

I submit not, he cannot use it in such a way that it does not percolate back to the river.

[De Villiers, C.J. referred to *Hough* v. *Van der Merwe* (1874, p. 148). If irrigation has lost the whole stream, he is not bound to return anything. If he is entitled to use all the water for irrigation above G, why cannot he take it below G?]

There must be some waste and we would not get that waste in our dam. The judgments are inconsistent with the view that applicant had only a *jus aquæductus*; the inference seems clear that it was intended that the riparian rights of the lower land should be done away with. In any case the respondent cannot take, above G, the water which he is entitled to as upper proprietor, and also the water which the lower land is entitled to. *Stewart* v. *Uniondale Municipality* (Juta 1, p. 346).

Mr. McGregor: We cannot admit that we are not entitled to claim as riparian proprietor below G. *Voet* (8, 3, 6); *Mackeley, Modern Civil Law* (p. 223); *Struben* v. *Cape Town and District Waterworks Company* (Juta 9, p. 75). The Court has never applied the test of the amount of river frontage to the question of user.

Mr. Innes: The passage of *Voet* quoted refers only to private water.

The application was dismissed, no order being made as to costs.

De Villiers, C.J.: During last August term an action was tried in which the present applicant was plaintiff and the present respondent was defendant, and which related to the very same stream of water which forms the subject of the present application. The declaration was quite wide enough to embrace the present claim but the Court, as then constituted, carefully guarded itself against admitting the claim that the plaintiff was entitled to prevent the defendant from using water in the stream on his land above the dam G. The Court, after full consideration, limited its judgment in favour of the plaintiff in the following terms: "That during the dry season the plaintiff is entitled to use the whole of the water flowing in the Dorp River at the dam on the farm Holle Sloot and that he is entitled to divert the said water." The Court further awarded to the plaintiff £10 as damages by reason of the defendant having diverted water from the furrow by means of which the water had for the full period of prescription been led by the plaintiff from the dam. A careful perusal of the pleadings, evidence, and judgment satisfies me that the Court did not intend to do more than declare the plaintiff's right by prescription to a servitude of *aquæductus* from the dam by means of a furrow over the farm Holle Sloot to the plaintiff's lower farm. The applicant now asks that the respondent be interdicted from taking any water from the stream above the dam for the purpose of irrigating land lying at a lower level than the dam. The respondent, on the other hand, while admitting that he is not entitled to more than a reasonable share of the water, claims the right to irrigate any portion of his farm at whatever level it may be situated. Any opinion which I may now express will of course be subject tc reconsideration in case the applicant should bring another action, but upon the facts now before the Court the applicant is not entitled to succeed. In the construction of instruments whereby servitudes are created the authorities say that doubtful expressions must be construed in favour of the servient tenement. I prefer in every case to resolve the doubts by reference to the terms of the instrument as a whole, but in the present case the Court is really asked by the applicant to construe the terms of a judgment, in so far as they are said to be doubtful, in favour of the owner of the dominant tenement. And as to the right by prescription the Court is asked to extend the right beyond the actual adverse user by virtue of which the servitude has been acquired. The applicant has for the period of prescription led water by means of a furrow from a dam on the respondent's land, but such adverse user had not the effect of preventing the respondent from taking his reasonable share of the water from a point higher than the dam, and leading it on to places lower than the dam. In fact he has not until lately done so, but this was only because he believed it to be physically impracticable and not because he was prevented by the plaintiff. As riparian proprietor the defendant had certain natural rights in respect of a public stream and, so far as the evidence goes, he has done nothing to justify his being deprived of such natural rights, except that he cannot take the water from the dam or from the applicant's artificial furrow. If he has not hitherto led water from the stream above the dam to irrigate land below the dam, the user of all the water by the lower proprietors for the period of prescription does not according to *Jordaan* v. *Winkelman* (Buch. Rep., 1879, p. 79), confer on them a prescriptive right against him, but the parties are thrown back on their ordinary rights as riparian proprietors. The respondent is, therefore, entitled to use a reasonable share of the water on every portion of his farm, and the only question of practical difficulty will be what is a reasonable share. If the parties should decide upon appointing an arbitrator to distribute the water he will have to consider, in addition to all the other circumstances, the fact that by judgment of the Court the respondent is debarred from leading water out of the dam and furrow, but that judgment would not prevent him from allowing the defendant to use a portion of his reasonable share below the dam. There will be no order on the present application.

Maasdorp, J.: I concur in the judgment given by the Chief Justice. I only want to say that when judgment was given at the trial I fully concurred in the decision given by the Acting Chief Justice, and for the reasons given by him. Now, in looking at the judgment of the Acting Chief Justice, I find nothing which decides the point which has been raised in this motion. But it is said that by implication it might be inferred from that judgment that the point was really decided in favour of the applicant. I do not see, however, any ground for such a view. But I may say the question was raised at the trial, and was discusseded in argument, but it was purposely not decided, as it was not raised on the pleadings. However, the applicant has now brought up the point for decision as he is entitled to do. At the trial it was decided that the respondent, who was then defendant, was entitled to the use of a reasonable share of the water in the river above the plaintiff's dam G, but no restriction was placed upon his use of such water on the farm below the point G. The applicant now seeks to have such restriction removed, and upon that issue I concur in the judgment of his lordship the Chief Justice.

[Applicant's Attorneys, Messrs. Walker & Jacobsohn ; Respondent's Attorney, V. A. van der Byl.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS (Chief Justice) and the Hon. Justice MAASDORP.]

PAARL FIRE ASSURANCE AND TRUST COMPANY, IN LIQUIDATION. { 1898. Jan. 13th.

Mr. Innes, Q.C. (with him Mr. Schreiner, Q.C.), applied for the confirmation of the first and final report of the liquidators. The report had been laid on the table and published in accordance with the usual practice. The assets amounted to £6,235 19s., and the interest £140 12s. 6d., against which were liabilities amounting to £365 0s. 10s., which had been paid. It was proposed to make a final payment of £3 7s. 6d. per share, so that the shareholders would in all receive £30 7s. 6d. in respect of each share, or a total sum of £5,906.

The report prayed for an order dissolving the company and directing the disposal of the books, &c.

Mr. Innes said that although the practice was to distribute the assets before dissolving a company, yet in the case of the *Cape of Good Hope Bank in Liquidation* (5 Sheil, p. 355), a contrary course had been adopted.

The Court granted an order confirming the report, and authorising the destruction of the books three months from date ; the Registrar was further authorised to issue an order dissolving the company upon being satisfied that the distribution of assets has taken place in accordance with the report.

[Applicant's Attorney, V. A. van der Byl.]

MULLER V. MULLER AND ANOTHER. { 1898. Jan. 13th.

Husband and Wife—Divorce—Funds to defend action.

Where the defendant in an action for divorce was entitled by virtue of an ante-nuptial contract between the parties to a sum of £200, which sum had not been paid to her, the plaintiff was restrained from proceeding with the action until he had first paid her £30 to enable her to defend the same.

This was an application for an order on plaintiff to pay over to the first-named defendant the sum of £50, to enable her to defend proceedings and maintain herself pending the result of the action instituted against her for divorce.

The applicant stated that she had a *bona fide* defence to the action, that she was entitled by ante-nuptial contract to the sum of £200 which had not been paid to her, and that she was not possessed of any other means.

Mr. Buchanan for the applicant.

Mr. McGregor for the respondent : I know of no case in which the Court has ordered contribution by the husband where the marriage has been entered into by ante-nuptial contract. As to the amount due under the contract the wife has only a *jus ad rem*, and she can only obtain it by instituting an action. In *Stage* v. *Stage* (Juta 2, p. 229), the parties were married in community. *Eaton* v. *Eaton* (5 E.D.C., p. 236). In *Harper* v. *Harper* (4 H.C.R., p. 247), there was a difference of opinion on the Bench.

[De Villiers, C.J. : The Court may refuse to allow the plaintiff to bring his action without first making a contribution.]

The Court would not do that unless it were clear that the defendant has no means and in that case she could defend *in forma pauperis.*

Mr. Buchanan : In *Tyfield* v. *Tyfield* (3 Sheil, p. 393), the parties were married out of community, and the Court ordered contribution. I do not press for alimony.

The Court made an order restraining the respondent from proceeding with the action of divorce, until he had first paid £30 to his wife to enable her to defend the action. The costs of the application to be paid by the respondent.

[Applicant's Attorney, C. C. Silberbauer: Respondent's Attorneys, Messrs. Walker & Jacobsohn.]

Ex parte MOSS FEBRUARY. { 1897. Jan. 13th.

This was an application for the cancellation of certain bonds upon payment to the Master of the capital and interest.

The petitioner alleged that at various dates between 1887 and 1894 he had mortgaged certain property and passed three bonds for the sums respectively of £130, £120, and £60 in favour of one Cohen, who had ceded them in June, 1897, to one Levy.

That in July, 1897, the petitioner sold a portion of the property to one Kramer for £410.

That in August, 1897, notice in writing was given to Levy that petitioner intended to pay off the bonds for £130 and £60; at the same time Levy was informed that the bond for £120 would not be paid off, but that the petitioner wished the portion sold by him as aforesaid to be released from the operation thereof and the property unsold to remain on mortgage as heretofore. The bond for £120 was so conditioned that it could not be paid off until the expiration of six years from the 1st October, 1893.

That no intimation had been received from the said Levy, whose address was No 51, Fischergate, in the County of York, England.

That the petitioner was being pressed for transfer by Kramer but was unable to effect the same, as he had not got the consent of Levy to the cancellation and release aforesaid.

That he was now desirous of paying off the bonds for £130 and £60, and was also prepared to pay off the bond for £120, together with interest up to the end of the six years stipulated as aforesaid.

Mr. Buchanan appeared for the petitioner.

The application was granted as prayed.

INSOLVENT ESTATE OF THE LATE GEORGE B. A. BREHM.—*Ex parte* BIDWELL.

Mr. Gardiner applied for an order authorising the Master to take the necessary steps for the appointment of a new trustee, owing to the death of the late trustee.

The application was granted.

PETITION OF JACOBUS PETRUS PRETORIUS.

Mr. McGregor applied for a rule *nisi* under the Derelict Lands Act to be made absolute.

The application was granted.

In re INSOLVENT ESTATE OF DANIEL H. A. SWART.—*Ex parte* BLORE.

Mr. Jones applied for a rule to be made absolute, calling upon one Julius Ascher to show cause why he should not be removed from the office of trustee in the above estate on account of his absence from the Colony.

The application was granted.

ESTATE OF THE LATE JAMES STEWART.

Mr. Buchanan applied for an order authorising the Registrar of Deeds to issue a certified copy of a certain mortgage bond, the original of which has been lost.

The Court held that there was not sufficient evidence as to the loss of the bond, and refused to make any order.

Postea (January 14th).

The application was renewed and affidavits were put in proving that the bond had been posted, but had never been received by the person to whom it had been sent.

Upon this evidence the order was granted.

Re GERDS' ANTE-NUPTIAL CONTRACT. { 1898. Jan. 13th.

This was an application by R. E. Wright, the trustee under the ante-nuptial contract of Frederick William Gerds and Ada Alice Gerds.

The applicant alleged that one Niven had been originally appointed trustee, but that Niven had left the Colony, and one Chase had then been appointed; Niven subsequently returned and was re-appointed, and on Niven's death the applicant was appointed trustee. That while Chase was trustee he had purchased certain land with funds forming part of the inheritance settled on Mr. and Mrs. Gerds by their ante-nuptial contract, and that this property was registered in the name of the trustee, and was used as a dwelling-house by Mr. and Mrs. Gerds. That the property was in need of repair which would cost £200 at least, and without such repairs the house could not be let; that there were no funds for the purpose, and the applicant did not consider that it would be to the advantage of the parties concerned to incur such expenditure. That with the consent of Mr. and Mrs. Gerds, he had sold the property for £950 to Robert Ord, and intended to invest the proceeds in shares in the Bank of Africa. That the Registrar of Deeds had refused to pass transfer on the ground that the children of Mr. and Mrs. Gerda, who were all minors, have in terms of the ante-nuptial contract an interest in the property, and that it could not be dealt with without an order of Court. The prayer was for leave to pass transfer to the said Ord.

Mr. Buchanan for the applicant.

The Chief Justice said that he wished to read through the ante-nuptial contract and decision would be given later.

Postea (January 14th).

The application was granted.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS (Chief Justice) and the Hon. Justice MAASDORP.]

Re ESTATE OF THE LATE HELEN CATHERINE CHABAUD. { 1898. Jan. 14th.

This was an application for leave to sell certain landed property in Port Elizabeth belonging to the estate of the late Helen Catherine Chabaud.

The petition of the executor of the late Helen Catherine Chabaud set out that under her will a certain dwelling-house at Port Elizabeth was bequeathed to the three daughters of the testatrix, viz., Adele Blanche, Heloise Helena, and Helen Dora. The last named had renounced her interest under the will to Heloise Helena. Adela Blanche was married to E. F. Simpson, and predeceased the testatrix leaving six children. The house in question was mortgaged for £500: repeated but unsuccessful attempts had been made to sell it, but quite recently an offer of £1,450 had been made and this offer was considered by the executor to be highly advantageous. Heloise Helena was willing to accept the offer. The children of Adela Blanche were entitled to take the place of their mother under the testamentary disposition and they were still minors. The Master reported that the sale would be to the benefit of the minors.

Mr. Buchanan appeared in support of the application.

The application was granted.

Ex parte JEANNETTE STORK. { 1898. Jan. 14th.

Husband and wife—Transfer of immovable property by wife without the assistance of her husband.

This was an application to have a rule *nisi* made absolute. Application was made originally on the 26th August for leave to the applicant to transfer certain property without the assistance of her husband, who had deserted her and left the Colony. The applicant was married out of community, and alleged that she had purchased the property with her own money. (See Vol. 7, p. 326.) The Court granted a rule *nisi*, the return day of which had been extended to the 12th January, which rule had been served personally on the husband. He had not entered appearance, but certain letters had been sent on his behalf to the Registrar of the Court, in which he made allegations detrimental to the character of the applicant and her mode of living, and stated that he had given her the money with which she had purchased the property. He further alleged that the purchaser of the property in question was a man with whom the applicant was cohabiting, and that it was used by her, and with his consent for the purposes of prostitution.

Mr. Schreiner, Q.C., appeared for the applicant, and said he had thought it advisable that Mrs. Stork should be in court to answer any questions which the Court might wish to put to her.

Mrs. Stork (called) said the property in question was bought with her money. It cost £250. All that money she made by prostitution. Her husband was aware of this. He did nothing to earn his living. He had now deserted her, having gone off with another woman, and she wished to have the property transferred to the name of the man with whom she was now cohabiting.

The Chief Justice said if there had been any likelihood of the respondent appearing, the Court might allow the matter to stand over. The respondent had had ample time, and he had not thought it worth while to appear. Formally, his consent was required, but he refused to give that consent, and had not shown cause why he refused. Under the circumstances, the applicant would be allowed to make the transfer without the consent of her husband.

[Applicant's Attorney, C. C. Silberbauer.]

Ex parte THE MUNICIPALITY OF MONTAGU.

Mr. Buchanan applied for a rule *nisi* under the Derelict Lands Act to be made absolute.

The application was granted.

THE COLONIAL GOVERNMENT V. RAPHAEL.

This was an application for respondent to show cause why he should not be arrested for contempt of Court.

The application was made in consequence of the disobedience of the respondent to an order of Court granted on November 2 last (see Vol. 7, p. 389) by which he was interdicted from obstructing a certain passage called Spin-lane, running into Plein-street, and adjoining his property. A proviso to the order was that he should be allowed to open packing-cases in the passage on condition that the empty packages be removed as soon as they have been opened: leave was also given to him to bring an action for the discharge of the interdict.

Affidavits now filed on behalf of the Government alleged that the respondent continued in the obstruction of the passage. No action has been instituted by him.

Mr. Sheil for the Government: Mr. Innes, Q.C., for the respondent.

After hearing Mr. Innes,

The Chief Justice said: The respondent has committed, in my opinion, contempt of Court. He has disobeyed the order of the Court not only in the letter, but in the spirit. I am not sure but the proper course would be to at once commit the respondent for contempt, but I think the Court will give him another chance, and will now order him to pay the costs of this application, but if there is another breach of the order of the Court there will be no leniency shown, and he will be committed. The Court gave him an opportunity to bring an action, but instead of doing this he has simply trifled with the order of the Court. If this accumulation of articles in this lane happens again the Court will probably commit the respondent, and will withdraw the proviso in the previous order which enables him to open these packages within the lane.

Mr. Sheil said he did not press for the committal of respondent. If the Court would give him, say, twenty-four hours to have the lane cleared he would not press for his committal.

The Chief Justice said the respondent would have to pay the costs of the application, and after what he had said he did not think it necessary to add anything further.

[Applicant's Attorneys, Messrs. J. & H. Reid & Nephew: Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

Re ESTATE OF THE LATE EDWARD THOMAS PHILIPPS.

Mr. Jones applied for leave to the executors to sell certain landed property in the estate on the ground that it was dilapidated and was not worth the cost of repairs. There were two minors interested in the estate. The executors undertook to invest the balance, after paying the costs of this application, on behalf of the heirs.

The application was granted.

GLADSTONE V. GLADSTONE.

Mr. Buchanan applied for a decree of divorce on the ground of the failure of the defendant to comply with the order for restitution of conjugal rights. As it appeared that the order had not been served personally on the defendant, but only on the attorney who had acted for her previous to the action, which had been allowed to go by default, the Court refused the application, but granted a fresh order calling on Mrs. Gladstone to return to her husband on 1st February, or show cause on 10th February why the decree should not be granted.

SKEAD V. WEBBER.

Mr. Jones moved for provisional sentence upon a promissory note for £150 10s. 6d.

Judgment as prayed.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

ADMISSION.

1898.
Feb. 1st.

Mr. De Waal applied for the admission of Mr. Michael Maximilian Bergh as an attorney and notary.

The application was granted, the oath to be taken before the Resident Magistrate of Albert.

PROVISIONAL ROLL.

GOLDSWORTHY V. GOLDSWORTHY.

Mr. Close applied for a decree of civil imprisonment on an unsatisfied judgment and costs.

The matter was ordered to stand over until the 10th instant, evidence having been given by the defendant's landlady that he was too unwell to attend the Court.

LEWIN V. DU PLESSIS AND ANOTHER.

Mr. Close applied for provisional sentence for the sum of £200, upon a promissory note.

The application was granted, subject to a certified translation of the promissory note being furnished.

VAN DER MERWE AND OTHERS V. VAN DER MERWE'S ESTATE.

Mr. Currey applied for the final adjudication of the insolvent estate.

The application was granted.

THE MASTER OF THE SUPREME COURT V. LOUW.

Mr. Sheil applied for an order calling upon the defendant to file an account in the estate of which he was executor.

The Court granted the usual order.

CHAMBERLAIN V. COLLINS.

Mr. Currey applied for provisional sentence on a promissory note for £52, with interest and costs of suit, and for judgment for £26, being the price of certain property.

The Chief Justice said there was a confession filed and judgment would be in terms of the confession.

PURCELL, YALLOP AND EVERETT V. ROBERTSON AND BAIN.

Mr. Buchanan applied for judgment on a cheque for £400 on the African Banking Corporation, and also for the sum of £415 18s. 6d. for goods sold and delivered, less the sum of £445 17s. 7d. paid on account.

The application was granted.

ILLIQUID ROLL.

THWAITES V. THE S.A. SALTPETRE-FIELDS, LIMITED.

Mr. Close applied for judgment upon a declaration for £200 with interest, and costs of suit.

The application was granted.

RABINOWITZ V. HORVITZ.

Mr. Innes applied for judgment for £900 with interest, and costs of suit, being the purchase price of certain land.

The application was granted.

SAMSON V. WARHAM.

Mr. Currey applied for judgment for £50, being the first instalment due of the purchase price of certain property, with interest and costs of suit.

The application was granted.

LESAR V. HENDRICKS.

Mr. Buchanan applied for judgment for £100, being the purchase price of certain ground, with interest and costs of suit.

The application was granted.

COLLISON V. DE KOCK.

Mr. Gardiner applied for judgment for £518 2s., less £135, for goods sold and delivered, with interest and costs of suit.

The application was granted.

THE COLONIAL GOVERNMENT V. BELL.

Mr. Sheil applied for judgment, in terms of the summons, for the purchase price of certain land at East London.

The application was granted.

REHABILITATIONS.

Mr. Close applied for the rehabilitation of Baldwin Keneway Turner.

The application was granted.

Mr. Buchanan applied for the rehabilitation of Thomas Caven Walker.

The application was granted.

Mr. Buchanan applied for the rehabilitation of Henry Freeman Lounder.

The application was granted.

Ex parte CACHET.

1898.
Jan. 14th.
Feb. 1st.

Minor — *Venia Aetatis* — Discharge from Tutelage.

Where a minor was desirous of carrying on a trading business for himself and it appeared that he was entitled to a certain legacy under the will of his parents, which provided that such legacy should be paid to the children upon their "marrying, attaining *majority or other approved condition," the Court refused to declare that he had attained majority, but upon satisfactory evidence being produced as to his capacity for business, granted an order authorising the payment to him of the legacy and declaring him discharged from tutelage.*

This was an application for an order for authorising the payment to a minor of an amount bequeathed to him by will and for a declaration that he had attained majority.

The applicant alleged that he was the son of Jan Lion Cachet and the late Catherine Lion Cachet, who were married in community of property, and that he was nineteen years of age on the 24th May, 1897. That by the joint will of his parents it was provided that "should the testatrix be the first dying of the testators then the testator should pay the sum of £700 to the children of their marriage upon such children marrying, attaining majority, or other approved conditions." That the testatrix was the first dying and left three children, of whom the applicant was the eldest. His share in the inheritance after deducting succession duty amounted to £231, and was paid into the Guardians' Fund in October, 1888.

The applicant stated further that he had been a clerk in a busines establishment at Steynsburg for the last three years, drawing a salary, and had supported himself and lived apart from his parents. He now wished to start in business for himself as a trader in the Free State, and for that reason made the present application.

The applicant's father approved of the application and was willing to assist him in starting in business with an advance of £400.

Mr. Buchanan appeared for the applicant.

[De Villiers, C.J.: Is there any precedent for an application of this nature?]

I have not found any decided case in point. *Grotius, Introduction* (1, 10, 3) speaks of the authority being given either by the Sovereign or the Court of Holland or any other Court legally empowered thereto. But *Groenewegen De Leg. Abr.* (C. 2, 44, 2) says that the Court of Holland would not entertain the application of Dirk van Groenewegen on the ground that none but the Sovereign power could declare a minor of age. *Van der Linden* (1, 4, 3, 3) says it may be done by State regulation. See also *Van der Keessel* (Th. 110, 161); *Kotze's Translation of Van Leeuwen* (Vol. I, p. 88), and note by *Decker*; *Voet* (4, 4, 3 and 4, 4, 4.)

De Villiers, C.J.: The Court will not make any order upon the information before it. The will says that the legacy is to be paid upon the children marrying, attaining majority or other approved conditions: "any approved condition" must mean some legal condition. In order to make out some case for *Venia aetatis* some stronger evidence should be before the Court. I should like to have some evidence from entirely disinterested witnesses as to the applicant's capacity to carry on business. There ought also to be some clear authority shown as to the power of the Court to give such an order.

Postea (February 1st).

The application was renewed, and further affidavits were read as to the business capacity of the applicant.

Mr. Buchanan: In *Ex parte Streicher* (3 Juta, p. 58), where money was bequeathed on similar conditions, the Court granted an order authorising payment to a minor. If the Court cannot declare that the applicant is a major, I ask that it will remove him from tutelage. At present he may be sued as he is practically emancipated, but it is not clear that he can sue. A release from tutelage would give him that power. *Grotius* (1, 10, 3).

De Villiers, C.J.: In the absence of any clear legal authority that the Court has the power to declare a minor to be a major in law, I am not prepared to exercise such a power in the present instance; that order might have a very far-reaching effect. But it seems in the interests of the minor that he should now be declared to have reached such an approved estate as to entitle him to receive the money due under the will. The Court has only the interests of the applicant to consider, and I am satisfied that he is of sufficient capacity to carry on business, and that he should also be discharged from tutelage; that is an order which the Court would be authorised to grant as being the guardian of minors. The Court will therefore grant an order authorising the payment to the applicant of the amount bequeathed to him, and declaring that he is discharged from tutelage. There is less difficulty in making the order in the present case seeing that the father concurs in the application.

ADVOCATE LOUIS O. MILLER
EX LIBRIS
JOHANNESBURG

Re THE INSOLVENT ESTATE OF MAURICE FRIEDMAN.

Practice—Rehabilitations.

Mr. Buchanan moved that this matter, an application for rehabilitation which was not on the roll, might be allowed to stand for Thursday, the 10th inst. It appeared that the applicant's attorney applied to have the matter put on the roll at three p.m. yesterday, but the Registrar refused to allow this to be done, as the Master's certificate had not been signed. Mr. Buchanan explained that the papers had been sent from the country, and it was probably thought that there was ample time for the certificate to be obtained after the notice was published.

The Court allowed the matter to stand over, but intimated that in future applications for rehabilitations will not be entertained by the Court unless the papers are in order before notice in the "Gazette" is given, and unless they are set down with the Registrar in the usual way.

GENERAL MOTIONS.

IN THE MATTER OF THE PETITION OF JOHANNES ANDRIES BAM.

Mr. Maskew moved for the rule *nisi* granted under the Derelict Lands Act to be made absolute.

The application was granted.

SHARK V. THE CAPE TOWN TRAMWAYS COMPANY, LIMITED.

Mr. Buchanan applied for a rule *nisi* for leave to sue in *in forma pauperis* an action for damages.

The application was granted, the rule to be returnable on February 10.

FAURE V. FAURE.

Mr. Close applied for a rule *nisi* for leave to sue for divorce *in forma pauperis.*

The application was granted, the rule to be returnable on February 17.

IN THE MATTER OF THE PETITION OF JOHN HENRY HOUGHTON AND WIFE.

Post-nuptial Contract.

This was an application for leave to enter into a post-nuptial contract. Houghton was a clerk employed in Cape Town, and his wife had recently arrived in the Colony from England, and the parties had been married here. The affidavits filed alleged that at the time of marriage the parties did not intend that there should be any community of property, nor were they aware of the Colonial law as to community; they intended that the wife should have the same rights as to her own property as if married in England.

Mr. Currey appeared for the petitioners.

The Court granted the order subject to all claims at present existing against the estate.

IN THE ESTATE OF THE LATE HADJE ABDOL MAJIET.

Mr. Gardiner applied for leave to raise the sum of £860 to pay off existing bonds, and for other purposes.

The order was granted in terms of the Master's report.

WELT V. WELT.

Mr. Graham applied for an extension of the return day until February 15

The application was granted.

WRIGHT, CROSSLEY AND CO. V. ROYAL BAKING POWDER COMPANY.

1898.
Feb. 1st.

Trade mark — Special — Distinctive word—Registration—Disclaimer.

The word Royal is not such a special and distinctive word as would, if used as a trade mark before the passing of Act 22 of 1877, be registrable under that Act.

The fact that goods with the label containing the word Royal were from time to time consigned from the United States to Natal, does not constitute sufficient proof that the word was "used as a trade mark" in terms of the Act.

This was an application to have made absolute the rule *nisi* calling upon the respondents to show cause why the alleged trade mark Royal shall not be removed from the Register of Trade Marks. On the 4th November, 1897 (see Vol. 7, p. 405), the applicants had presented a petition to the Court, in which they said that they had carried on business as millers and manufacturers at Liverpool for the last fifty years, and had for the last forty-five years manufactured baking powder, which they labelled Royal Baking Powder. For some time they had exported this baking powder largely to South Africa. About March, 1897, they had applied to have their trade mark registered in the Deeds Registry, but objection was raised by the respondents on the ground that they had themselves registered the word Royal. The applicants contended that the word could not be registered as a trade mark under our statutes inasmuch as it was a word of quality, and it was necessary that it should be expunged before the applicants' trade mark could be registered. The applicants did not object to respondents using the word, but objected to their having the exclusive use of it. The Court thereupon granted a rule *nisi* calling upon respondents to show cause why the alleged trade mark Royal should not be removed from the Register of Trade Marks on the ground that it is not a registrable trade mark within the Trade Marks Acts, and why the respondents should not pay the costs.

The President of the respondent company now filed an affidavit deposing that his company had manufactured Royal Baking Powder for upwards of thirty years, and had exported it continuously to the colonies of South Africa since 1876, and that the word Royal had been used uniformly as the trade mark or designating term. In 1876 a shipment of the baking powder had been made to the firm of Parker, Wood & Co., which had at that time, he believed, business houses or connections located at Cape Town, Port Elizabeth, and Durban. Early in 1877 another shipment had been made to the same firm. It was the intention that the goods should be distributed to the different houses of that firm, and by them distributed to the general trade. That during the last five years the company had made large shipments to the colonies of South Africa, a large part of which had gone to the Cape of Good Hope.

Mr. Innes, Q.C. (with him Mr. Schreiner, Q.C.), for the applicants : We have no objection to the use of the word Royal by the respondents, but we object to their exclusive use of it. We do not ourselves want the exclusive use of the word, but we cannot register our trade mark without first having theirs removed. A similar case was tried in England between the same parties and the word was removed. *In re Royal Baking Powder Company* (W.N., 1880) ; *Sebastian*, (3rd ed., pp. 22, 67, 366).

Mr. Searle, Q.C., for the respondent company : The terms of our Trade Mark Act are almost entirely the same as those of the English Acts. I can find no case decided in England which shows that the word Royal cannot be registered. We claim under Act 22 of 1877, section 9, on the ground that it is a special and distinctive word which was used as a trade mark before the passing of that Act. It was registered here in 1888 as a trade mark used before 1877. I admit that the use before 1877 must be use in this Colony. The affidavits say that shipments have been continuous since 1876.

[De Villiers, C.J. : On the evidence I cannot find that any of the goods reached this colony before 1877.]

As we have our mark registered it is for the applicants to show that we were not entitled to have it registered ; they must produce evidence that it was not used in this colony. We go further, and claim under Act 12 of 1895, section 2, sub-section (*c*), inasmuch as Royal is a word having no reference to the character or quality of the goods. Single words have often been registered. Imperial has been registered as applied to soap. *Sebastian* (p. 74).

The Courts are more lenient with regard to distinctive words than with regard to fancy words. *Sebastian* (pp. 50, 52) ; *In the matter of The Royal Baking Powder Company of New York*, *Cutler's Patent, Design and Trade Mark Cases*, April 9th, 1897). It is clear from the report that the Court there held that the Royal Company had not used the word before 1875 ; therefore it could only come in as a word having no reference to the quality of the goods, &c. In order that it should have reference to the quality and character of the goods there must be some connection between the word and the goods. *Sebastian* (pp. 59, 67). If the word indicates a process or principle of the article it must be struck out. An ordinary adjective such as "superfine," "nourishing" is disqualified.

[De Villiers, C.J. ; Royal has a very wide meaning. The *Imperial Dictionary* gives "splendid," 'magnificent."]

It is not necessary for me to show more than that it is a distinctive term.

Mr. Innes : To justify this word remaining on the register it must be shown that it is special and distinctive, and that it was used before 1877. As to the use it is a matter exclusively within the knowledge of the respondents and they must prove it. The word is simply an adjective ; *e.g.*, "Royal progress," "Royal purple." The matter has been conclusively settled in England. W. N., May 31st, 1879 (p. 108); *Law Journal*, June 7th, 1879 (p. 108); W. N., March 20th, 1880 (p. 49).

De Villiers, C.J.: The rule must be made absolute and the respondents' alleged trade mark, consisting in the word Royal must be removed from the Register on the ground that it is not a registrable trade mark. The respondents maintain that it is a special and distinctive word which, having been used as a trade mark before 1877, could be registered as such under the Trade Marks Act of that year or under the Act of 1893. I cannot concur in that view that the word Royal is special and distinctive. It has come to have a wider meaning than Kingly, and in the Imperial Dictionary such synonyms as splendid and magnificent are mentioned as equivalent in meaning to the word Royal Then, as to the word having been used as a trade mark before 1877, the evidence is quite inconclusive. Some consignments of the respondents' Royal Baking Powder were sent from the United States to Natal, but there is no proof that a single case of baking powder with the respondents' label on it ever reached this colony. The applicants do not object to the use by the respondents of the word Royal. They have themselves used the word to describe their Baking Powder, but they have disclaimed any right to the exclusive use of the word. They object, however, to the respondents registering the word as a trade mark, with the result that they would become entitled to the exclusive use of it. The objection is a good one, and the rule must be made absolute with costs.

[Applicants' Attorneys, Messrs. Walker & Jacobsohn; Respondents' Attorneys, Messrs. Fairbridge, Arderne & Lawton.[

DUTCH REFORMED CHURCH v. TOWN COUNCIL.

1898.
Feb. 1st.
„ 2nd.
„ 9th.

Arbitration—Award—Uncertainty—Finality—Reference back—Misconduct of arbitrators—*Reductie*—Expropriation—Evidence—Municipal Regulations.

An arbitrator, after having published his award, cannot alter it unless it is referred back to him by the Court for that purpose.

Among the objects for which the Court would refer back the award are to correct a material mistake admitted by the arbitrator himself, to reconsider the award in consequence of the discovery of new and material evidence, and to fix the exact amount payable where the award has laid down the basis upon which the amount should be ascertained.

The admission by arbitrators, which would not be strictly admissible in a Court of law, is not a ground for impeaching the award, unless there was an absence of admissible evidence in support of the award, in which case the award might be set aside, but not referred back.

Where land belonging to a religious body is expropriated by a Town Council for the purpose of town improvements, evidence is admissible to show the value of the land as a building site for shops and offices intended to be built for the purpose of letting the same, and thus obtaining a revenue for church purposes.

Such evidence is admissible notwithstanding (a) *that the Town Council has the power under its regulations to require that all plans of new buildings shall first be approved of by them, or* (b) *that the grant of land had been made on condition that it should be used exclusively for church purposes.*

Disproportion of the amount awarded to the true value is not a ground for impeaching the award, unless the disproportion is so gross as to bear on the face of it clear proof of partiality or corruption, in which case the award might be set aside, but not referred back to the guilty arbitrator.

This was an application by the Kerkeraad of the D.R. Church to have an award of the majority of the arbitrators, in regard to the expropriation of certain land, made a rule of Court. The parties had proceeded to arbitration in terms of Act 26 of 1893, and Act 6 of 1882, upon the question of the amount of compensation to be paid to the Kerkeraad in respect of the expropriation by the Council, for the purpose of widening Adderley-street, of certain land at the corner of Adderley-street and Bureau-street. The arbitrators, by a majority, awarded (1) the sum of £19,229, with interest on the sum of £11,446 at 5 per cent. from the 16th September, 1896, as compensation and damage sustained in connection with the abovementioned land; (2) such amount as the architect, Mr. J. E. Vixseboxse, shall be legally entitled to in connection with the plans of the at present proposed buildings; (3) costs of the reference and awards and arbitrators' fees to be paid by the Town Council. The respondents opposed the application, and made a cross-application that the matters in dispute might be remitted to the reconsideration and redetermination of the arbitrators. Their petition set out: That the first witness called by the Kerkeraad was one Vixseboxse, who stated that towards the end of 1895, in consequence of instructions from the Kerkeraad, he drew up certain plans and specifications for the erection of shops and offices upon the land expropriated, and these plans were put in. That on the 30th December, 1895, the Council passed a resolution approving of the refusal of their Public Works Committee to sanction the proposed buildings, inasmuch as they would be in advance of the line of street, and that information of this resolution was given to the Kerkeraad on the 9th January, 1896. That counsel for the Kerkeraad proposed to examine the said Vixseboxse before the arbitrators as to the rental which might be derived from shops and offices erected in accordance with the plans aforesaid. Upon the first question, being such as to rental addressed to such witness, counsel for the Council objected, stating that the Council objected to any buildings being put up there on the site, quite apart from the question of expropriation, and he objected to any evidence being taken as to the amount of rent which may have been gained from buildings which the Council objected to, because they objected to any buildings being put there at all. He further stated that he desired to raise the point that the Church had no right whatever to build these buildings at all under the conditions of title which they hold. That they were entitled to the land from the Crown on the condition that it should be used exclusively for Church purposes, and the title was thereupon put in. That counsel thereupon objected to any evidence being given on the point raised by him. That thereupon the arbitrators decided to note the objection, but declined to rule the evidence out of court. That this objection was maintained throughout the proceedings. That the evidence brought before the arbitrators by the Kerkeraad was directed to proving the value of the land expropriated as a site for erecting the proposed and other buildings for shops and offices. That it is manifestly clear that the majority of arbitrators in making their award have done so by arriving at the capital value to the Kerkeraad of the land expropriated as a site for the erection of shops and offices, the estimate of such capital value being based upon a rental which would be derivable if such shops and offices were erected, for upon no other basis could an award of the great magnitude be arrived at. Further, it is clear that the majority of arbitrators in making their award for interest upon a portion of the amount awarded as compensation to run from the date of the formal notice of the appointment of an arbitrator have done so in respect of the alleged value to the Church of the shops and offices shown on the plan aforesaid as a property which would have been rent-producing from the date when such shops and offices would have been erected. That the majority of the arbitrators have adjudged in their award that petitioners should pay to the said Church such amount as the architect, Mr. J. E. Vixseboxse, shall legally be entitled to in connection with the plans of the at present proposed buildings, and have not finally fixed the amount thereof. That upon the 9th January, 1896, the regulations in force in the Municipality were the regulations published in the "Gazette" of the 14th June, 1889, under Government Notice 456 of 1889. Upon these grounds the Town Council prayed that the matter might be re-submitted to the arbitrators.

Mr. Innes, Q.C. (with him Mr. Graham), for the applicants: Mr. Schreiner, Q.C. (with him Mr. McGregor), for the respondents.

Mr. Schreiner, upon the cross-application: The Municipal Act 26 of 1893, section 186, incorporates the provisions of Act 6 of 1882. We apply under section 3, sub-section 14. In the common law of England there used generally to be a clause in deeds of submission to the effect that the Court should have power to remit to the arbitrator. *Russell on Arbitration* (5th edition, p. 464) as to the statutory clause now existing. I submit that the Court would determine whether there has been any such irregularity as would be ground for review of proceedings in an inferior Court and if so remit the matter. The ground of objection is that the ground can only be used for church purposes, and therefore evidence as to its value as rent producing is inadmissible. In England, under the Common Law Procedure Act, when the evidence was objected to a case would have been stated to the Court, but in our Act there is no such procedure laid down.

[De Villiers, C.J.: How is any value to be placed on the ground, except its saleable value? Are arbitrators to take a merely sentimental value?]

It has a value to the Church—the religious value—the value of its privacy and seclusion to the congregation. The Town Council had the power, by refusing to pass plans, to prohibit building on the land in question in order that the street might be of uniform width. Act 26 of 1893, section 168; Regulations 193, 194, 198; *Clark* v. *Town Council of Cape Town* (4 Sheil, p. 42). The value of the land must now be judged of as if that had been done. It must be valued also with its burdens; any servitudes or conditions upon it are detrimental to the land and must be taken into consideration. The Church is not entitled to build in order to obtain revenue; if entitled to do that they would also be entitled to sell, in order to get funds for the church. *Story on Equity* (section 1,191). The Court will prevent the abuse of a trust. *The Attorney-General* v. *The Governors of Sherborne Grammar School* (18 Bevan, p. 280). As to the architct's fees the arbitrators were wrong in saying that the Council should pay what the architect was legally entitled to; the principle of an award of arbitrators is certainty. *Russell* (pp. 282, 284). The amount to be paid must be fixed. *Redmond on Arbitration* (p. 124); *Graham* v. *D'Arcy* (C.D. and L., p. 385); *Voet* (4, 8, 18.)

Mr. Innes: The common law gives the Court no power to remit the matter. The Dutch law gave two remedies: (1) *reductio*, a correction of the award, of which notice had to be given within ten days; that is practically obsolete; the only reference I can find to it is in *Twentyman* v. *Chisholm* (3 Menzies, p. 161); (2) a setting aside of the award altogether. *Voet* (4, 8, 24). The Court has extended the grounds there laid down so as to include cases of gross irregularity. *Dietz* v. *Pohl* (1 M., p. 397). This Court is in exactly the same position as the English Courts were before the passing of the Common Law Procedure Act. Proceedings in England are now governed by the Arbitration Act of 1889 (52 and 53 Vict. C. 49, sect. 26). Similar provisions to those in our statute have been interpreted in *Hodgkinson* v. *Fernie* (27 L.J., C.P., p. 66) and *Hogg* v. *Burgess* (27 L.J., Ex., p. 318). Those cases show that the Court will remit where there is misconduct or error on the face of the award, or where an amount is given on a matter not included in the submission. *Grafham* v. *Turnbull* (44 L.J. Ch., p. 538). The Court of Chancery held itself bound by the same rules in this respect as the Courts of Common Law. *Dinn* v. *Blake* (10 L.R.C.P., p. 388). In *Allen* v. *Greenslade* (33 L.T. (N.S.) p. 567), it was held that a mistake of law is no ground for setting aside an award. *Greenwood* v. *Brownhall* (44 L.T. (N.S.), p. 47); *Whiteley* v. *Roberts* (L.R., Ch. D. 1891, Vol. 1, p. 958). The practice is not to remit on the ground of mistake unless the arbitrator comes into court and admits his mistake. In *Municipality of Wynberg* v. *Town Council of Cape Town* (9 Juta, p. 412), this Court refused to interfere with the arbitrator's award as to costs. In *Table Bay Harbour Board* v. *The Metropolitan Railway Company* (9 Juta, p. 437), it was held that the matter should not be remitted unless the arbitrators admitted a mistake before the Court. There is nothing to show here that the arbitrators have made a mistake.

[De Villiers, C.J.: Might not the matter of the architect's fees be one of those which might be remitted for certainty?]

Possibly. As to the wrongful admission of evidence, I cannot admit that the Council can refuse to allow persons to build on their own land or that they can refuse to pass any plans without pointing out the alterations required. In *Clark's case* there were objections to the plans.

As to the terms of the grant, it was the intention of the grantor that the land, which was vacant land, should be used for the benefit of the Church, and therefore for church purposes. The grant has always been acted upon in that way; other buildings have been erected upon portion of the same land and the Crown has never interfered. If the Church cannot build upon it, it must lie waste, and be absolutely valueless. It is not in the same position as land in England which has been consecrated; in that case the tenure is altered, and a faculty must be obtained before the land is dealt with. The respondents cannot raise any objection to our use of the ground in this way; it is a matter between the grantor and the grantee.

[De Villiers, C.J.: Could not a member of the congregation restrain the Kerkeraad from using the land in this way.]

He might have a *locus standi*, but that does not apply to the Council.

[De Villiers, C.J.: That fact would tend to reduce the value of the land.]

That might be so, but the possibility would be so remote that the arbitrators would not have any ground for taking it into consideration. As a test of the value of the land there is the position that if the ratepayers refuse to carry out the Council's scheme for widening Adderley-street and provide the money, the Council can sell it in building lots. *McDonald* v. *The Engineer of the Midland and North Eastern Railway* (7 Juta, p. 290). As to the claim for architect's fees, under Act 26 of 1893, section 175, we are entitled to claim for consequential damages. We claim interest for delay and expense of having plans prepared; such fees are fairly certain. The question of want of certainty arose in *Twentyman* v. *Chisholm* (3 M., p. 161). As to the competency of an arbitrator to award interest, *Russell* (7th ed., p. 427).

Mr. Schreiner: The mistake is admitted on the face of the record. The objection was taken *in limine* that the evidence as to the value of the land was not admissible, and it was said then that the matter should be determined by the Court.

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The Chief Justice said: This is an application by the Consistory of the Dutch Reformed Church in Cape Town to have the award of certain arbitrators made a rule of Court. The reference was made to the arbitrators in consequence of the Town Council of Cape Town desiring to expropriate certain land belonging to the Church and situate along Adderley-street. By their award a majority of the arbitrators adjudged that the Council should pay to the Consistory (1) the sum of £19,229, with interest on the sum of £11,446 at 5 per cent. per annum from the 16th of September, 1896, as compensation and damage sustained in connection with the land to be taken and expropriated, and (2) such amount as the architect, Mr. Vixseboxse, shall be legally entitled to in connection with the plans of certain buildings which the Consistory had decided to build on the site in question. The Town Council has filed a counter-petition praying that the matters in dispute may be remitted to the reconsideration and redetermination of the arbitrators, on the ground that they admitted evidence of the value of the land based upon the assumption that it could be legally used as a building site for shops and offices. Such evidence, the respondents say, ought to have been excluded, (1) because in accordance with the Municipal Regulations they were legally justified, without paying any compensation, and for the purpose of improving the town, in refusing to allow buildings to be erected on the site, and (2) because the grant in favour of the Church contains the condition that the land shall be used exclusively for church purposes. The respondents also ask for a reconsideration of those portions of the award which adjudge the payment of interest, as being *ultra vires*, and which adjudge the payment of such sum as the architect may be entitled to, as rendering the award vague and uncertain. The 175th section of the Cape Town Municipality Act, 1893, empowers the Council to treat for the purchase of the land required for town improvements, and enacts that, if the owner and the Council shall not agree upon the purchase money or recompense for consequential damages to be paid, then the amount shall be settled by arbitration. The 68th section enacts that for the purpose of any land taken and of any arbitration, the provisions of the Lands and Arbitrations Clauses Act, 1882, are to apply. It was under these provisions that the arbitration now in question took place. The applicants and respondents could not agree as to the compensation to be paid, and the applicants were compelled to submit the question to arbitrators, selected by the parties. If the main question now at issue between the parties had to be decided according to English law and practice, there can be no doubt that the Town Council would fail in the counter-application. There is no mistake of fact or of law apparent on the face of the award or admitted by the arbitrators; there is no allegation of irregularity in their proceedings; there is no charge against them of bias, corruption, or other form of misbehaviour; there is no imputation of fraud or concealment of evidence on the part of the Consistory; and there is no insufficiency in the award itself nor any allegation of the discovery of new evidence since the publication of the award. In the absence of any of these grounds for reopening an award or impugning its validity no English Court would refer it back to the arbitrators. Even where an arbitrator has come to a wrong decision as to the competency of a witness, the admission of evidence, or the propriety of allowing proof of particular facts, it is, according to *Russell* (Arbitration, 7th ed., p. 200), settled law in England that the Court will not review his decision, or set aside the award for the mistake. The case must, however, be decided according to our own law, and I proceed briefly to consider the jurisdiction of this Court in respect of arbitrations and awards. The practical convenience of allowing persons to select their own judges for the settlement of their disputes was recognised by the Roman law, which, according to more than one Imperial rescript, did not allow an appeal against a regular award (*Code*, 2, 55, 1). According to *Voet* (4, 8, 1) submissions to arbitration were frequent in the Netherlands in his time, and were resorted to by those who wished to avoid the heavier expenses of litigation, the din and strife of the Courts, the law's delay, and the anxiety caused by the uncertainty as to the result. Strangely enough, however, a practice had already been introduced which by encroaching upon the principle of finality, must have had the effect of reproducing the very delay, expense, and uncertainty which it was the object of submission to arbitration to avoid. The practice was that a party who deemed himself aggrieved by the award might, within ten days after the publication thereof, give notice to the opposite party that he repudiated the award and might by legal process claim a so-called "reductie," that is to say, such an amendment of the award as would be approved of by a man of good sense and judgment. This "mandament van reductie" was but another name for an appeal against the award. In order to obviate as far as possible the want of certainty and finality thus introduced, it became customary to insert into deeds of submission a clause whereby both parties agreed irrevocably to abide by the award, and to have the same made a rule of court. The clause was almost identical with that which was inserted into the deed which led to the award in the case of *Combrinck* v. *Colonial Government* (12 S.C.R. 99). *Voet* (4. 8. 31.) advises arbitrators to prevent the award from becoming known to either party before it is made a rule of court, lest the one who is aggrieved thereby should seek relief against the submission and against his consent to condemnation, after giving security to abide by the award in the event of final judgment being given against him. The procedure of reduction was still in full use in Holland at the time of the cession of this colony to Great Britain, and is mentioned by *Van der Linden* (Institutes 3, 6, 7) as one of the different kinds of appeal to the higher Courts. It is a remarkable instance of the great but silent influence of English procedure upon the practice of this Court that no case can be found in which the Dutch process of reduction has been resorted to in this colony. Certainly since the appointment of English and Scotch judges in 1828 the principle of the finality of awards became firmly established in our Courts. I am not prepared to say that the whole body of the English law relating to arbitration has been introduced. In the case, for instance, of an award which is so grossly disproportionate to the value or damages to be decided upon as to bear on the face of it proof of partiality, I should not feel bound by the rule of the English Courts requiring proof *aliunde* before they will interfere. But where there is no charge of misconduct or of irregularity the practice of allowing appeals on the mere ground that the amount awarded is excessive or inadequate must be considered to have become entirely obsolete in this colony. And, whatever doubts might exist as to the general law, there can be none as to the practice which should be observed in the case of arbitrations which, like the one now under consideration, take place under the Act of 1882. The 12th sub-section of section 3 is unambiguous in its terms, and enacts that the award "shall be final and binding on all parties to the reference." In support, however, of their petition for a reference back to the arbitrators the respondents rely upon the 14th sub-section, which enacts that "any competent Court shall have the power to remit the matters referred, or any of them, to the reconsideration and redetermination of the arbitrators, upon such terms as to costs and otherwise as to such Court may seem proper." Such a power is obviously desirable in the view, especially, of the rule of our law that, without the authority of a competent Court, an arbitrator cannot alter his own award after it has once been published. The same power was, in fact, exercised by this Court many years before the passing of the Act of 1882. In the case of

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Wynberg Railway Company v. *Eksteen* (1 Roscoe, 70), decided in 1863, the award adjudged that the company should pay to Eksteen a certain sum as compensation for land expropriated, and should allow him to take the clay excavated from land so expropriated. The objection was taken that the arbitrators ought to have fixed the value of the clay in order that, if Eksteen should prefer not to take the clay, he might have pecuniary compensation instead. The objection was sustained, and the award was referred back to the arbitrators to assess the value of the clay. Following that precedent the Court would, if Mr. Innes had not practically consented to portion of the award being expunged, have remitted the award to the arbitrators with a direction to them to reconsider and redetermine that portion of the award which adjudges the payment by the respondents of such amount as the architect shall be legally entitled to. It was quite competent for the arbitrators, under the provision as to consequential damages, to award compensation for the expenses incurred in the employment of the architect for the designing of the buildings which the applicants were prevented from erecting, but the arbitrators ought to have fixed the amount of such compensation. Their failure to do so does not invalidate the whole award, but it affords an occasion for the exercise of the power vested in the Court of referring back the award to render certain that portion which is somewhat vague and uncertain. Other cases might be stated in which the Court would exercise the power, as, for instance, where new evidence has been discovered since the publication of the award, or where a material mistake is admitted by the arbitrator. Upon the main issue, in the present case, there is no uncertainty as to the amount awarded; the arbitrators do not admit any mistake, and it is not alleged that any new and material evidence has been discovered, but the respondents ask that the award may be referred back because the arbitrators have admitted illegal evidence. If the evidence was really inadmissible and there was no other evidence before the arbitrators to support their award, I am not prepared to say that this Court would follow the English practice of refusing to interfere even in such cases. If, however, the Court did interfere, it would set aside the award and not refer it back. The Court would be clearly justified in setting aside an award where the arbitrators have committed such an irregularity as to refuse to admit relevant and necessary evidence, and it should equally be competent for this Court to interfere where it is clear that the award is only supported by inadmissible evidence. In the present case, however, the evidence objected to was, in my opinion, admissible, and would have been admitted by this Court if it had to determine the questions in dispute. Even if the evidence was inadmissible, there was ample evidence, other than that which was objected to, to support the award. The evidence objected to related to the value of the land as a building site for shops and offices. The contention is that, inasmuch as the Council had the power of withholding its consent to the building of such shops and offices, the site could not be valued as a building site at all. The contention is a startling one, and, if supported, will have far-reaching consequences. The regulation relied upon is the 194th, which provides that "the Town Council shall, within fourteen days after receiving a notice and plans in respect of a proposed new building, or of a proposed conversion or alteration of an old building, signify to the person giving or sending the same whether it approves or disapproves thereof." If the regulation had stopped here, there might have been some plausibility in the argument that the Council may, if it requires the site for its own purposes, reduce the compensation payable for expropriation by simply withholding its consent to the plans. But the regulation proceeds thus: "If the Council disapproves, it shall give to the persons intending to build notice of the alterations in the plans which it requires to be adopted." Clearly, therefore, the only objections which the Council can take is to the plans. Where, as in the present case, the plans are approved of, it would be preposterous to hold that the Council may withhold its consent for the purpose of obtaining the land cheaply. It was never intended that powers given for one purpose should be held *in terrorem* to compel owners of land to come to terms in connection with expropriation, which is a power given for a wholly different purpose. The present is a case of Church property, but it might have been the case of a private individual owning a valuable site in the town. Supposing that stores on such a site have been destroyed by fire. The owner proposes to rebuild, and submits to the Council plans for a building which would be an ornament to the town, and to which no possible objection can be taken, except that the site is required by the Council for town improvements. The Town Council accordingly says to the owner: "Your plans are quite unexceptionable, but we refuse to consent to the rebuilding. We shall expropriate the land, but after forcing you into arbitration, we shall object to the arbitrators valuing the land as if it had any value for building purposes." The unfortunate owner, having lost the stores by fire, would thus practically lose his land also. The bare statement of such a result is sufficient to expose the weakness of the contention, and nothing that fell from the Court in the case of *Clark* v. *Cape Town Council* (4 Sheil) tends in any way to support it. The second objection to the admissibility of the evidence is that the grant in favour of the Consistory contains the condition that the land shall be used exclusively for Church purposes. The Consistory intended to use the rents that would have been derived from the buildings for Church purposes only, and it is by no means clear that the erection of buildings for the purpose of thus augmenting the annual Church revenues would be a breach of the condition. But assuming that it did constitute such a breach, the only parties who could object are the Government and members of the congregation. The Town Council certainly could not take advantage of the condition by excluding from the consideration of the arbitrators the value of the land as a building site. They were quite right in bringing to the notice of the arbitrators the existence of the condition, and the arbitrators were in duty bound to bear that fact in mind in making the award. But they may well have come to the conclusion that a breach of the condition had not been clearly established, or that, if there was a breach, neither the Government nor any members of the congregation were likely to take advantage of it. If such was their opinion, they were in duty bound also to inquire into the value of the land as a building site. They might allow for the possibility of an objection being raised by the Crown or by the congregation, but they were bound also to bear in mind the fact that in respect of buildings long before erected by the Consistory as part of the land no objection has hitherto been taken, and the further fact that the Council has for years been levying rates upon those very buildings. There is nothing to show that the arbitrators did not give full consideration to all these matters before deciding upon their award. Some of the brokers who gave evidence valued the land at many thousands more than the amount awarded, and it may well be that the condition in the grant had its full weight with the arbitrators. If the question of compensation had arisen in this Court the judgment would probably have been for a still smaller sum, but in the absence of any right of appeal such a test cannot now be applied. The award is framed on a somewhat liberal scale, but there is a vast mass of evidence to support it, and there is no allegation that the arbitrators were guilty of any bias, partiality, or other form of misbehaviour. If such an allegation had been made and proved the proper course would have been to set aside the award altogether, and not to refer it back, as the Court is asked to do, to arbitrators who would have proved so utterly unworthy of the trust reposed in them. In regard to the objection as to interest, it really forms part of the compensation which the arbitrators had the power to award. They directed the payment of interest on portion of the sum awarded from the date upon which the Council finally decided upon expropriation. The Court would probably not have allowed the interest, but the allowance by the arbitrators was within the scope of the reference to them. The result is that the Court will set aside that portion of the award which relates to the fees payable to the architect, and make the award thus amended a rule of Court. The respondents having failed on the main issue will pay the costs.

Mr. Justice Buchanan said: I concur in the judgment. Practically the application is in the nature of an appeal from the decision of the arbitrators. The parties in the case chose their own judges, and those judges were possessed of full powers to decide on all questions of fact and of law. They have performed their duties in the most *bona fide* manner; they have not been guilty of any partiality, favour, or improper conduct, and there is no admission by them of any mistake. In the absence of such improper conduct, in the absence of any admission of the mistake, and bearing in mind the fact that both by the submission and by the Act of Parliament the arbitrators had full power to decide on the amount of the award, I think the Court is bound to confirm their award. I have no doubt that the arbitrators were bound to consider the restrictions in the title deed, but those restrictions were brought fully before the arbitrators, and it was for them to consider how far those restrictions should influence them in awarding a greater or a lesser amount of compensation. If there had been such a gross exercise of their discretion as awarding an amount which would have been inequitable, I think the proper course would have been not to refer the case back, but to cancel the award entirely. With regard to the question of Mr. Vixseboxse's fees, Mr. Justice Maasdorp and myself are of opinion that it would be better to strike them out altogether, mainly on account of the uncertainty of the amount. The main point we have to bear in mind was that where parties refer matters to arbitration, and the arbitration is properly conducted, and the award is *bona fide*, the Court has no option but to confirm the award. I wish to add the fact that Mr. Justice Maasdorp also concurs in the judgment.

[Applicants' Attorney, C. C. Silberbauer; Respondents' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

THERON V. THERON. { 1898. Feb. 2nd.

This was an action by the husband for divorce on the ground of his wife's adultery with a trader named Nicolaas Vos. The parties were married in the year 1889, the plaintiff being a farmer in the Calvinia district. There was one child of the marriage.

Mr. McGregor appeared for the plaintiff; the defendant appeared in person.

Evidence was given by a servant named Koopmans as to witnessing acts of adultery during the absence of the petitioner in Bushmansland, on an occasion on which she went to close some shutters. Other witnesses also gave evidence as to acts of familiarity between the defendant and Vos. This evidence was denied by the defendant, who attributed its production to enmity on the part of the witnesses.

Jacobus Louw, father of the defendant, also gave evidence, and stated that Koopmans had left the farm before the departure of the petitioner. He said that the windows of the room mentioned by Koopmans closed on the inside.

After argument,

The Chief Justice gave judgment. He said: Before the Court grants a decree of divorce on the ground of adultery, the adultery must be clearly established, and I am bound to say that I am not satisfied in this case that it has been established. After all, the case depends entirely upon the evidence of the witness Koopmans. No doubt some of the other witnesses deposed to acts of familiarity, but all of them are perfectly consistent with innocence. Koopmans says she was sent by Mrs. Theron to close the shutters of the room from the outside. Now if it be proved that there were no shutters on the outside, then it is extremely improbable that she could have been sent outside to close the shutters which fastened on the inside. But it is difficult to see why she should have been sent to close the shutters at all. If Mrs. Theron intended to commit adultery, she surely would have gone to close the shutters herself. Well, then, Koopmans says that there was a candle burning in the room which was put out, and that it was bright moonlight. That being the case, I should have thought that her face would have been seen by the persons who she says were committing adultery upon the bed. Then great doubt is cast upon the evidence by Mr. Louw, the father of the defendant, who swore positively that the shutters closed on the inside, and that the witness Koopmans was dismissed and left the place before Mr. Theron left. Well, this is quite inconsistent with her evidence that the adultery took place after Mr. Theron left, and these grounds seem quite insufficient to cast a slur of adultery upon this lady. I am of opinion therefore that there should be absolution from the instance.

Mr. Justice Buchanan concurred. He pointed out that the alleged adultery took place three years ago, and no action had been brought till the present time.

[Plaintiff's Attorney, Messrs. Walker & Jacobsohn.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

REGINA V. SEPTEMBER. { 1898. Feb. 3rd.

The Chief Justice said that amongst the cases which had come before him as judge of the week had been the case of Fritz September, who was charged before the Resident Magistrate of Bredasdorp with housebreaking and attempt to steal and theft. First of all a preliminary examination was taken, and the prisoner said "I have nothing to say," whereupon the Attorney-General remitted the case to the Magistrate to try the prisoner for housebreaking and attempt to steal and theft under Act 43 of 1885. The Magistrate on re-hearing the case headed the record: "Remitted under Act 43 of 1885; plea of guilty." The plea of guilty was a mistake, for there was no plea of guilty. A sentence of two years' imprisonment with hard labour was passed, and the Magistrate had therefore sentenced the prisoner as if the case had been remitted under Act 12 of 1860, which would have justified a sentence of two years' imprisonment with hard labour. But a remittal under Act 43 of 1885 only justified a sentence of one year's imprisonment with hard labour, and the sentence must therefore be reduced to one year's imprisonment with hard labour.

In re THE ESTATE OF THE LATE TOBIAS P. PFUHL.

Mr. De Waal applied on behalf of the widow and executrix of the deceased Tobias P. Pfuhl for leave to sell certain property belonging to the estate.

The petitioner alleged that by the will of her husband, she together with the children of the marriage had been appointed sole and universal heirs subject to a life usufruct in her favour, and subject further to the condition that she should have no right whatever to sell or dispose of any asset belonging to the estate, with the exception of a certain grocery business.

She alleged further that she had been married in community to her husband. That she was now desirous of selling the landed property belonging to herself as well as that belonging to her husband's estate, and to pay out the inheritances accruing to the heirs. That all the heirs were majors and consented to the proposal.

The Court granted an order authorising the widow to administer the estate, seeing that all the other executors of the will were either dead or absent.

Ex parte JOSEPH ERNEST CONTAT. { 1898. Feb. 3rd.

Companies Act, 25 of 1892, sections 86, 97—Amendment of register —Registration of contract.

This was an application for an order authorising the amendment of the list of shareholders in the Contat's Colliery Estate and Railway Company (Limited), and for other purposes. The petitioner stated that he was a shareholder in the Contat's Collieries Estate and Railway Company, which was duly registered under the Companies Act of 1892, the capital being £130,000. That by the articles of association 100,000 shares had been allotted to him in settlement of the purchase price of certain valuable rights belonging to him, these shares being issued as fully paid-up shares, as in truth they were. That the requirements of section 97 of the Companies Act of 1892 had not been brought to his notice, nor had the contract been registered. That in *bona fide* ignorance of such requirements, he had issued the 100,000 shares to different shareholders, whose names were filed with the Registrar of Deeds. That he had lately been advised of the necessity for registration of the contract, and had obtained the consent of the majority of the shareholders to the striking of their names off the list, and the execution and registration of a proper contract, and re-issue of the shares. That the total debt of the company did not exceed £5,500, and that creditors representing £4,253 2s. 1d. thereof had consented to the present application; and the present company also approved of it.

Wherefore he prayed for an order (1) allowing the amendment of the register by having the names of the allottees of the said 100,000 shares struck off; (2) allowing the execution and registration of a proper contract as required by Act 25 of 1892, section 97; (3) granting leave to re-issue the said shares after the registration of such contract. The consents referred to were filed with the petition.

Mr. Innes, Q.C., appeared for the petitioner: The Court has power under section 86 of Act 25 of 1892 to amend the register. Section 97 is more stringent than the similar provisions in the English Act. The articles of association point out the arrangement which has been arrived at. The shares purport to be fully paid up. *Firmstone's case*; *In re Malaga Lead Co.* (L.R., 20 Eq., p. 524). There it was held that the articles of association did not constitute a contract in writing within section 25 of the Companies Act of 1867. *In re Denton Colliery Co.* (L.R., 18 Eq., p. 16) : *New Zealand Kapanga Gold Mining Co.* (Footnote to case last cited) : *Darlington Forge Co.* (34 Ch.D., p. 522). The criminal offence will not stand in the way, because that was committed when the contract was entered into, and nothing can affect that. The want of knowledge on the part of the allottees seems clear.

The Court granted the order as prayed allowing the amendment of the register, the execution and registration of a proper contract as required, without prejudice, however, to the rights of any creditors before the date of the new registration who had not signed consent.

[Applicant's Attorneys, Messrs. Walker & Jacobsohn.]

In re THE INSOLVENT ESTATE OF MICHAEL SMUTS BLATT.

Mr. Close applied for the discharge of the insolvent.

The application was granted.

DOLF V. DOLF.

Mr. Close applied on behalf of the wife in this case for leave to sue her husband for divorce *in forma pauperis*.

Petitioner stated that she was a general servant earning £1 10s. a month. Her husband had left her without means of support, and was now living with another woman at Wynberg.

The Court referred the matter to counsel, and upon his certificate granted a rule *nisi*, returnable on Thursday next.

FRASER V. SOLOMON. { 1898. Feb. 3rd.

Misrepresentation—Agency—Sale of land.

S. *employed* B., *a broker, to negotiate with a view to the purchase of certain property belonging to* F. B. *communicated with* F. *and through his agency a sale of the property to* S. *was concluded.* S. *afterwards repudiated the sale on the ground of misrepresentation in that she had been told by* F. *that there was only one lease on the property, which lease was for three years, whereas in fact the lease specified was for five years, and there was another lease which had still four years to run.*

Held, *that statements made by* F *to* B. *preliminary to the completion of the sale must be taken to have been made to* S., *but that there was nothing to show that any misrepresentation had been made by* F.

This was an action for the payment of the sum of £8,000, the purchase price of certain property in Long-street.

The plaintiff in his declaration alleged that on the 22nd September last he purchased certain land and premises known 72, Long-street, and 153 and 155, Longmarket-street, from the defendant; that the sale was effected through one Boosé, a broker, and a broker's note was duly passed; that it was the duty of the defendant on the 15th November to take, transfer, and pay the purchase price, £8,000, and interest at 5 per cent. from the 1st October; that she had neglected to do so, although transfer had been tendered. He claimed £8,000 and interest from the 1st October, and £100 damages.

The defendant, Mrs. Solomon, in her plea, denied liability. She said that when the contract was entered into, the plaintiff, by himself or his agent, represented to her that there was only one lease running with the premises, whereunder one Pischoli had occupation, that the said lease was for three years, of which the greater portion had already elapsed, and that she entered into the contract under the inducement of this representation. Subsequently she discovered that there was no lease in favour of Pischoli, but a lease in favour of Ferreira and Lopes for five years, of which only eight or nine months had elapsed, and a lease under which one Hartman occupied, which was for five years and had still four years to run. Since these discoveries she said she had collected no rents. She alleged that the aforesaid representation was a warranty, the breach of which entitled her to repudiate the contract, or otherwise that she was misled and entitled to repudiate. She tendered £68 5s. the rents collected before the discovery of the leases.

Alternately the defendant pleaded that the representation was fraudulent, and prayed that the claim might be dismissed.

In reconvention she claimed that the sale might be cancelled, and the plaintiff ordered to pay £25 as damages for loss sustained owing to her inability to let the premises on account of the leases.

The replication was general.

The broker's note referred to contained the following clauses :

"3. The seller to remain in possession of portion of the premises now occupied by him for a period of twelve months at a rental of £25 per month.

"4. The rents to be the property of the purchaser from the 1st October, 1897."

Mr. Schreiner, Q.C. (with him Mr. Close), for the plaintiff.

Mr. McGregor (with him Mr. Buchanan) for the defendant.

Thomas Aitchison Fraser, the plaintiff, said he carried on business in Long-street in part of the property which was in suit in this case. He was the ownor of the properties alluded to in Long-street and Long-market-street. At the end of September a Mr. Boosé, a broker, called to see him and asked him what price he wanted for the property, to which he replied £8,500. The property was then in Mr. Joseph's hands for £8,250. Mr. Boosé did not mention for whom he was acting. Subsequently he came to see witness again, and witness then came down to £8,250, and afterwards he agreed to take £8,000. Witness told Boosé then that there were two leases on the property, and referred him to his bookkeeper, informing him that the rents were about £60 a month. As a matter of fact, there were several small tenants of the property besides the two lessees, but witness told Boosé that he could get all particulars from his bookkeeper. He had never had a tenant or known anyone of the name of Pischoli. He received the broker's note on the morning after the conversation with Boosé, but neither the purchaser's nor the seller's names were on it. He then sent his bookkeeper down to the broker, and the note then came back with the names filled in. He never told Boosé that there was only one lease on the property, but simply referred him to his bookkeeper. In contemplation of receiving the £8,000, he had purchased certain property and made arrangements to retire certain bonds, and in consequence of that he had had to borrow money, and had been put to serious inconvenience.

Cross-examined : He did not know that the name Piscoli was over a door on his property. He remembered the names of Ferreira and Lopes, who occupied part of the property. Mr. Boosé had never had the property to sell for him.

George Jopp, bookkeeper to the plaintiff, said that Mr. Boosé came to the plaintiff's place of business, and witness furnished him with particulars as to the rents and told him that there were two leases on the property. He had never heard the name Pischoli before.

Mr. G. Trollip, the attorney for the plaintiff, said that until the plea was filed no word was said as to misrepresentation.

This closed the case for the plaintiff.

For the defence,

Frederick Henry Boosé, a broker, residing in Cape Town, said that about eighteen months ago he had the property in suit given him by Mr. Fraser to sell for £5,000, with a rental of £50 a month. He had made offers to Mr. Fraser on behalf of Mr. Hoogendoorn and of Mr. Newmark, and he offered Mr. Fraser's property to Mrs. Solomon, as, having sold some property for her just previously, he thought it would be a good investment for her money. Mrs. Solomon told him to find out the lowest price which Mr. Fraser would take for the property. On the day of the sale Mr. Fraser agreed to give him 2½ per cent. commission, and subsequently Mr. Solomon instructed him to find out whether there were any leases on the property. He saw Mr. Fraser again, and the latter told him that there was a lease with one Pischoli for three years, the greater portion of which had run off. He added that that was the only lease existing on the property. Upon this Mr. Solomon was satisfied, and authorised him to close the transaction.

Cross-examined by Mr. Schreiner : Witness said he contradicted point blank the statements of the plaintiff and Mr. Jopp. The arrangement he made with Mr. Solomon was that he should share half the brokerage with him.

Henry Solomon, a broker, said he was the husband of the defendant in the case, and bought and sold properties for her. On the

18th September the last witness came to him and mentioned the plaintiff's property as being for sale. On the 22nd he came again and said that the price of the property was £8,000, and that there was one lease in the case of Pischoli for three years, the greater portion of which had run off. If he had known that there were leases on the property he would not have bought it, as he had intended to make alterations in the premises.

Re-examined: Witness gave notice to all tenants, increasing their rents, with the exception of Pischoli, with whom the lease was. He would be willing to take the property now if it were not for the leases.

In further cross-examination witness said that he did not think that 8 or 9 per cent., which the rents represented, was a fair return on an investment of £8,000 in house property.

James Edwin Dyke, a builder, said that he went up with Mr. Boosé to inspect the premises with a view to making alterations on the ground floor.

This closed the case for the defence.

Mr. McGregor: In this contract there was a warranty; there was also misrepresentation and there was fraud. On all these grounds the contract should be rescinded. Boosé being a broker, was agent for both parties. *Story on Agency* (section 28). But he was primarily the agent for the party who first employed him. *Story* (section 31 and sections 137-139). Being agent for both the seller should see that communications must be made known to the purchaser. The seller is bound to disclose defects.

[De Villiers, C.J.: I think we may take it that he is bound to disclose leases.]

As to a presumption of condonation of fraud being rebutted by entering appearance, *Clough* v. *The London and North-western Railway Co.* (L.J. (N.S.), Ex., p. 17.)

Mr. Schreiner said that he did not press for damages.

The Chief Justice, without calling upon counsel for the plaintiff, gave judgment. He said: The plaintiff in this action seeks to recover the purchase price of property alleged to have been sold by him to the defendant, and to compel the defendant to take transfer upon payment by him of the purchase price. Now the defence to this action is that a misrepresentation was made to the defendant by the plaintiff, the misrepresentation consisting in this, that he represented to the defendant that there was only one lease running with a certain Pischcoli, that such lease was for three years, of which the greater part had run off, and that that was the only lease. Then there is a further plea of fraud, but I do not think that that is insisted on, for there appears to be nothing fraudulent in the conduct of the plaintiff. Now, if there was a misrepresentation by the plaintiff to the defendant the defendant would be entitled to succeed. The first question is, to whom was this alleged misrepresentation made? The whole of the evidence tendered by the defendant goes to show that if any such misrepresentation was made it was made by the plaintiff to Mr. Boosé. That is the effect of the evidence, and the whole of the evidence also shows that Boosé was primarily employed by the defendant for the purpose of negotiating with a view to sale. Whatever statements, therefore, were made by the plaintiff to Boosé preliminary to this final purchase must have been taken to have been made to the defendant himself, and in fact the defendant himself does not deny that he knew that the properties were let. The question, therefore, does not arise whether the defendant might not insist upon possession of the property being given immediately. Where there is a sale of land, I take it, it is the duty of the vendor not only to give transfer but to give actual possession. I take it that that is clearly established. But if the purchaser purchases, knowing that there are leases upon the property, then he cannot insist upon taking possession if he gets notice that the sale is to be subject to existing leases. The defendant does not deny that he knew that the property was let, and he did not deny that he was bound by any contracts entered into with the lessees. His defence is that he did not know that the lease was for so long a term of years; that he was told that it was only three years, whereas the lease actually was for five years, and that he did not know that there was any other lease at all. But he admits that the properties were let. The defence cannot be raised that the defendant must have immediate possession, but the defence is that the plaintiff misrepresented to the defendant the extent to which the land was burdened by these leases. On that point we have to elect between the evidence given by the plaintiff and that given by Boosé. Well, I am not prepared to say that Boosé intentionally gave false evidence, but I think he has wholly misunderstood the communications between himself and the plaintiff. What object could the plaintiff possibly have in making these misrepresentations, because he surely must have known that if he made these misrepresentations, as soon as the purchaser got possession he would discover that it was false, and that that might be a ground for upsetting the contract altogether. It would be such an entirely objectless fraud or misrepresentation, knowing that the misstatements would be discovered immediately after transfer. Therefore that makes it extremely improbable that any such communications could ever have been made by the plaintiff to Boosé. Then the plaintiff referred Boosé to Jopp for particulars, and I am quite satisfied upon the evidence that Boosé's notes in his note-book were taken down from statements given to him by Jopp, and he was much more intent, apparently, on knowing the amount of rent, than the facts in regard to the leases. Very well then, if these communications made to Boosé must be considered to have been made to Solomon, then Solomon had full notice that there were leases upon the property, and he had an opportunity of knowing exactly the nature of those leases. Beyond that I do not think plaintiff is entitled to go. But now counsel for the defendant argues that we must dismiss altogether all communications made by the plaintiff to Boosé, that we must only consider what was said by Boosé to the defendant. Surely that argument can not be applied in the present case. Boosé was originally and primarily employed by the defendant, and we find that even before this time Boosé was acting as agent for the collection of rents for the defendant, and he continued to be the medium for the collection of rents afterwards, and in my opinion he was considered as acting immediately for Solomon, and if he received full information from the plaintiff before completing the sale and full means of information also, Solomon was bound by such information and such means of information. Well, with these views it is quite clear that the plaintiff is entitled to succeed. The defendant knew of these leases, and made no further inquiries, and cannot now seek to rescind the sale or to defend the action. The plaintiff has withdrawn the claim for damages, and there will be judgment for the plaintiff in terms of the first prayer of the declaration, viz., that the defendant be ordered to pay £8,000 as the purchase price of the property and interest as prayed, the plaintiff giving transfer, the defendant to pay the costs of the suit. There is one other point I omitted, and that is, that on the face of the broker's note there is an indication to the defendant that there was rent and that the property was let, because the term rents in the fourth clause of the broker's note cannot be taken to refer to the rent which was payable by the seller.

Buchanan and Maasdorp. J.J., concurred.

[Plaintiff's Attorney, Gus. Trollip; Defendant's Attorney, P. M. Brink.]

NOTE.—It subsequently appeared that the misapprehension with regard to the lease to "Pischoli," had its origin in a signboard in the Italian language placed over a door by Ferreira and Lopez announcing that they were *pischoli*, *i.e.*, fish-sellers.

SUPREME COURT

[Before the Right Hon Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

SEAGERS V. SEAGERS. { 1898. Feb. 4th.

This was an action for divorce brought by Maria Seagers against her husband on the ground of adultery.

Mr. Buchanan, for the plaintiff, said the parties were married in 1875, and it was alleged that on several occasions since then adultery had been committed.

Reginald Barry. clerk in charge of the marriage register at the Colonial Office, produced the marriage certificate of the parties.

Maria Seagers, the plaintiff, said the defendant was her husband. They were married on February 1, 1875, at S. George's Church. The signatures in the register (produced) were those of herself and her husband. After their marriage they lived in Cape Town. There were three sons of the marriage. Two of these were married, and the third was supporting himself, so there was no claim for the custody of the children, and there was no property. Her husband used to bring women to the house, or else he went with them. Her husband had a child by a woman who lived in Brown-street. When the youngest child was three years of age her husband brought a woman named Bella Williams to the house, and they had a quarrel. He used to stay out of the house at night, and ultimately he left her and went to live with Bella Williams in St. John-street. She identified the photographs of her husband and Bella Williams (produced). Since her husband left her she had supported herself. Three months ago her husband left Bella Williams, after living with her for thirteen years, and went to live with another woman.

By the Chief Justice: Her husband worked at Isaacs' carpet works. She was a dressmaker, but off and on she went out to service.

Mrs. Marie Helen Cornelus said she had known the defendant and Bella Williams for some years. She recognised the photographs put in. In 1895 or 1896 she engaged a room in defendant's house in Longmarket-street. The defendant and Miss Williams were living there as man and wife. They had two children.

By the Chief Justice: The woman who had just been in the box was not Bella Williams.

Mr. Buchanan said he had other witnesses.

The Chief Justice: That will do. Take a decree of divorce, with costs.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinne.]

FRONEMAN V. PETZER. { 1898. Feb. 4th.

Impounding cattle—Hut-burning—Building on land of another—Knowledge of owner.

F. *leased certain land to* P. *and verbally agreed to allow him the use of a certain paddock when he was working with his cattle. Within half an hour after the cattle had been outspanned subsequent to this being used* F. *seized them in the paddock and impounded them.*

Held, *that* F.'s *action was illegal.*

P. *with the knowledge of* F. *built a hut on the paddock and it was occupied by his servant.* F. *gave notice to the servant to quit, and on his neglect to do so burnt the hut.*

Held, *that* P. *was entitled to damages for the destruction of the hut.*

This was an appeal from the judgment of the Resident Magistrate of Stutterheim in an action in which the respondent Petzer sued for the sum of £10 damages for having burnt a hut, said to be the property of plaintiff, and also for having, on four occasions, unlawfully impounded certain cattle which belonged to plaintiff.

The defendant excepted to the jurisdiction on the ground that the question of the title to land or tenements was concerned, and that rights in future might be bound.

He also excepted to the summons on the ground that the hut belonged to one Charlie, who alone had a right of action: and further, that it was vague and embarrassing, as it did not aver how much of the damages was claimed for the destruction of the hut, and how much for the impounding.

The exceptions were overruled, the Magistrate stating in his reasons for so doing that he was satisfied that Charlie was in the plaintiff's employ, and that the plaintiff erected the hut for the accommodation of his servants.

The evidence called showed that the plaintiff occupied under lease from the defendant a certain dwelling-house and certain ten acres of land separate from and in a different lot to the house. It was admitted by the defendant that when the contract of lease was signed he agreed to allow the plaintiff to use a certain paddock adjoining the house when he was working with his cattle or had no herd, or when it was raining; that this included his spare oxen, and only those he was working with. This arrangement was not included in the lease. The cattle were seized when in this paddock, and after the first impounding the plaintiff was warned by the defendant. The evidence was vague as to the circumstances under which they were impounded. The defendant's witnesses said that they were not being used at the time, but the plaintiff's wife alleged, with reference to one occasion, that they were on their way to water after returning from Stutterheim. The hut was erected on the paddock by the plaintiff, and was occupied by Charlie, a native in his employ. The defendant gave notice to Charlie to remove, and on his failure to do so, burnt the hut. The Magistrate gave judgment for plaintiff for £3 10s.

with costs, £2 10s. being allowed as damages for the destruction of the hut, and £1 for the unlawful impounding.

The Magistrate in his reasons stated, *inter alia*, that he found that the hut had been erected by the plaintiff with the full knowledge and consent of the defendant, and that up to the 27th October no objection had been taken to the plaintiff's occupation thereof; that the action taken by defendant was prompted by the plaintiff having impounded the defendant's cattle on the abovementioned date. As to the use of the paddock, he found that it had not been proved to his satisfaction that the plaintiff had been guilty of such a breach of his agreement as to justify the defendant in impounding the cattle.

From this judgment the defendant appealed.

Mr. Innes, Q.C., appeared for the appellant.

There was no appearance for the respondent.

The only exception I rely on is that regarding the apportionment of the damages: the absence of such apportionment in the summons might have caused great inconvenience. Petzer had no right to the use of the paddock; he only had a concession to use it on certain occasions and under certain circumstances. There is no evidence that this was one of the occasions.

[De Villiers, C.J.: If the cattle had been used and were just outspanned, does not that come within the permission?]

That must be proved, the Magistrate does not find that that was the case: he is vague. As to the burning of the hut there is a conflict of evidence, but the Magistrate finds that the appellant acquiesced in the erection of the hut. The Court has already laid down that a *mala fide* possessor who makes improvements on the land with the knowledge of the owner is in the position of a *bona fide* possessor. A *bona fide* possessor is entitled to the materials with which he built. But in this case the materials belonged to Froneman, and the hut was erected by Charlie.

[De Villiers, C.J.: But Charlie was Petzer's servant.]

Though called a servant he was not paid regular wages; he appears to have been a sort of squatter or retainer.

The Chief Justice said: There were two questions which the Magistrate had to decide; first, whether the plaintiff was justified in impounding the cattle, and in the next place, whether he was justified in burning down the hut. As to the impounding of the cattle, there were two or three occasions when, perhaps, he was justified in doing so, but on one occasion I am of opinion he was not justified, and that was when the plaintiff had been using the cattle to go to Stutterheim, and when, after they had been outspanned, within half an hour the defendant proceeded to impound the cattle. That was a case falling within one of the three admitted exceptions of the lease, according to which the plaintiff was to be allowed to run the cattle in the paddock when he had no servant, or when it was raining, or when he was using the cattle. Using the cattle was not confined to ploughing. The next question is: what was a reasonable amount of damage to give? The damage awarded may be rather high, but it is not very excessive, and the Magistrate was quite right in considering the inconvenience to the man. The Magistrate might have made the damage a few shillings less, but for the sake of a few shillings I do not think the Court can now override the decision of the Magistrate. As to burning the hut, it was a high-handed proceeding. Evidently the Magistrate believed that it was burnt down with the knowledge and consent of the plaintiff. The materials for building the hut were cut upon land on which the defendant had the licence of cutting. Mr. Innes says the wood belonged to the defendant, but I am not sure of that. After the building of the hut, the plaintiff would have been entitled to the use of it until the contract or lease had expired, but he was deprived of the use of it. He had given the labour and the material, and I do not think £2 10s. was an excessive amount to award. The appeal must be dismissed.

[Appellant's Attorneys, Messrs. Van Zyl & Busininne.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and Hon. Mr. Justice BUCHANAN.]

THERON V. NIEUWENHUIZEN. { 1898. Feb. 9th.

Lessee—Transfer—Right to sue for damages.

The lessee of a farm, although not empowered by the owner to sue, *has a* locus standi *to sue for damages for trespassing upon the land.*

This was an appeal from the decision of the Acting Resident Magistrate of Fraserburg in an action brought by the appellant against the respondent for £10 damages for trespass upon plaintiff's farm Windhoek with two flocks of sheep. The defendant took the following exception to the summons:

Defendant denies that plaintiff is the owner of the farm Windhoek, and that as he has produced no document to prove that he has the right to sue for trespass on Windhoek given him by the legal owner or owners, defendant prays for absolution from the instance with costs.

For the plaintiff a contract of lease was put in which showed that he was the lessee of the farm from the General Estate and Orphan Chamber in whose name as owner it was registered.

The Acting Magistrate sustained the exception, giving the following reasons: According to the deed of lease put in and evidence adduced it was clearly proved that plaintiff was not the owner of the farm Windhoek, and as there is no clause in the said deed of lease giving him, plaintiff, power to sue for damages or loss sustained through trespass of cattle or sheep on the said farm Windhoek I had no hesitation in upholding the exception and dismissing the case with costs.

Mr. Searle, Q.C., for the appellant. The position that the lessee cannot sue is untenable. *Woodfall on Landlord and Tenant* (p. 778). A person in occupation is entitled to sue for damages against the wrongdoer. The only other point is whether the plaintiff is bound to set out his title in the summons; that is settled law. *Ackerman* v. *Adams* (1 Juta, p. 177); *Doubell* v. *Tipper* (11 S.C.R., p. 23); *Supra* v. *Schlobber and Schlobber* (9 E.D.R., p. 126).

Mr. Graham for the respondent: I admit that the possession gives the power to sue. The summons however says that the farm is the plaintiff's and the exception is on that point.

De Villiers, C.J.: It is clear that the Magistrate has erred in his judgment. He allowed the exception to the summons on the ground that, as there was no clause in the lease to the plaintiff empowering him to sue for damages for trespass, the action was wrongly brought by him. If the plaintiff, as lessee, could not sue for damages for trespass, it is difficult to say who could. The damages were done to him as lessee and not to the owner. He had lawful occupation of the land and that gave him sufficient *locus standi* to institute the action. The appeal must be allowed with costs, and the case remitted to the Magistrate to be decided on its merits.

[Appellant's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Respondent's Attorneys, Messrs. Walker & Jacobsohn.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS P.C., K.C.M.G. (Chief Justice), and Hon. Mr. Justice BUCHANAN.]

PROVISIONAL ROLL.

GOLDSWORTHY V. GOLDSWORTHY. 1898. Feb. 10th.

Mr. Close, for the plaintiff, Mrs. Goldsworthy, applied for a decree of civil imprisonment against the defendant upon an unsatisfied judgment for £27 15s. 8d. Defendant, who appeared in person, said he was in the employ of the Harbour Board, and was earning £9 a month. He was only able to pay £1 a month towards the support of his wife and child. He was paying 25s. a week for his board and lodging, and 7s. 6d. a month for washing. He also had private creditors to pay.

Cross-examined by Mr. Close, defendant said that he came down to the Harbour Board offices on the day from which the case was postponed in order to forward certain returns which he was compelled to attend to.

Mr. Close said that Mrs. Goldsworthy was a very delicate woman, and she only had £58 a year to live on, instead of £76 as was stated during the original proceedings.

Defendant stated that his wife looked thin, but she was in reality a strong, wiry woman.

The Court granted a decree of civil imprisonment, with costs, against the defendant, execution to be stayed pending payment of £1 10s. on the first of each month, with leave to the plaintiff to apply for an increase.

BURMAN BROS. V. RADEMEYER.

Mr. Buchanan applied for provisional sentence on six promissory notes for £663 15s. 5d., with interest from the various due dates of the notes, less £305 17s. 9d. paid on account.

The application was granted.

SMITH V. BEER.

Mr. Molteno applied for the final adjudication of the defendant's estate.

Mr. Buchanan, on behalf of the defendant, applied for a postponement of the case on the ground that the plaintiff was a partner of the defendant, and that, if that circumstance were taken into consideration, the defendant would not be insolvent.

The Court ordered the case to stand over till Thursday.

ILLIQUID ROLL.

SEDGWICK AND CO. V. BRUNS.

Mr. Buchanan applied for judgment under Rule 329 for £120 14s. 8d., for goods sold and delivered, and for £80, money advanced.

The application was granted.

GENERAL MOTIONS.

DOLF V. DOLF.

Mr. Close applied for an extension of the return day of the rule *nisi* till Thursday next.

The application was granted.

SHARK V. CAPE TOWN TRAMWAYS, LIMITED.

Mr. Buchanan applied for the rule *nisi*, calling upon the Tramway Company to show cause why the plaintiff should not be allowed to sue *in forma pauperis*, to be made absolute.

The application was granted.

BIRD V. BIRD.

Mr. Close applied on behalf of the wife, Mrs. Bird. for leave to sue her husband, George Stephenson Bird, by edictal citation for restitution of conjugal rights.

The Court granted the application, personal service to be effected, and the citation returnable on May 5.

IN THE MATTER OF THE MINOR ROBERT CECIL GLYNN.

1898.
Feb. 10th.

Legacy to be paid on attaining majority—Payment authorised to minor.

Mr. Ward applied for an order authorising the Master to pay out, in such sums as he may determine, the amount standing to the credit of the minor, to be expended in the professional education of the latter as an electrical engineer. £300 had been bequeathed to him to be paid when he reached majority, and £201 was due as his share as one of the testator's residuary legatees.

The Master had made a report in favour of granting the application.

Mr. Ward: *In re Coetzee* (4 Sheil, p. 32) the Court made an order under similar circumstances.

[De Villiers, C.J.: The will in that case was invalid. Moreover the minor had been practically emancipated.]

The English Courts are more favourable towards the payment of money for advancement than for maintenance. In *Harvey* v. *Harvey* (2 Piers Williams Reports, p. 21) a legacy was ordered to be paid over.

De Villiers, C.J.: The Court has always refused to allow payment to be made to minors in cases where there is a prohibition of payment before they reached the age of majority, and even where there is a direction, without any prohibition, that it shall be paid on reaching majority the Court has been very careful not to allow the payment before majority unless there are special circumstances in the case. In the present case I think the Court would best consult the interests of the minor and probably the wishes of the testator by authorising the payment of the amount for the purpose required.

Re THE ESTATE OF THE LATE ELIZABETH HERMAN.

1898.
Feb. 10th.

This was an application for leave to raise a loan of £8,000 upon a mortgage of the above estate.

The petition of the executors set out that they were anxious to raise a loan of £8,000 to enable them to build a terrace of nine villas at a cost of £6,500 upon the immovable property of the estate, which would when erected bring in a rental of £7 a month. That the property was bonded for £1,000, and its market value was £4,000

That the executors had in their private capacity advanced £500 to the estate, in order to liquidate the debts and close the account.

That all the children (two daughters and two sons) of the testatrix were majors and unmarried, and agreed to the granting of the prayer of the petition.

They prayed for leave to raise £8,000 upon first mortgage in order to erect the villas, pay off the bond of £1,000, and repay the abovementioned sum of £500.

The will of Mrs. Herman appointed her children sole heirs of all her property, but directed that her two daughters should enjoy the usufruct thereof as long as they remained unmarried; in the event of one of them dying or marrying the remaining or surviving unmarried daughter should enjoy the whole of the usufruct, and in the event of both of them dying or marrying, or one marrying and one dying, the whole of the estate should be realised and divided equally *per stirpes*.

The Master had made no report on the matter as no minors were interested.

Mr. Schreiner, Q.C., for the applicants.

The application was granted.

[Applicant's Attorneys, Messrs. Findlay & Tait.]

IN THE MATTER OF THE MINORS VAN ZYL.

Mr. Gardiner applied for leave to sell certain landed property registered in the names of the minors.

The Court granted the order in terms of he Master's report.

PENTZ V. PENTZ.

{ 1898.
Feb. 10th.

This was an action by the wife for restitution of conjugal rights, failing which for divorce and the custody of the child of the marriage.

Mr. Jones appeared for the plaintiff; the defendant was in default.

The amendment of the declaration was allowed, so as to include a prayer of £2 a month for maintenance of the child.

Caroline Pentz, the plaintiff, said she was born at Worcester, and was married in Johannesburg on July 23, 1896, by Captain Von Brandis. At that time she was eighteen years of age, and her husband, who was born in Cape Town, was twenty-two. Three weeks after the marriage her husband, left her and went to Barberton, though he told her at the time that he was going to Cape Town. On the 6th August he returned to Johannesburg, and stayed till the 19th, when he told her he was going to Elandsfontein to collect some outstanding accounts. He wrote to her from Elandsfontein, and shortly afterwards witness gave birth to a child on August 30.

By the Court: She was married on July 23, and the child was born on August 30. Her husband was the father of the child.

In further examination by counsel, witness said that her husband never came back, and her father paid for her board, her husband contributing nothing towards her support. After the birth of her child she went down to Somerset West, whence she wrote to the defendant, but the latter did not reply. In April, 1897, she met him in Cape Town at the corner of the Dutch Reformed Church in Bree-street, but, though he saw her, he took no notice of her. She then went to Mr. Muller, the minister of the Dutch Reformed Church, and an investigation took place, in the course of which her husband refused to live with her. Witness took certain proceedings in the Magistrate's Court to recover the maintenance of the child, but was unsuccessful. Defendant had never contributed anything towards her maintenance. He was now working for his father, who was a market agent in Cape Town.

John Beer stated that he knew the defendant, who was employed by his (defendant's) father at the market. He did not know what the defendant was earning, but a man in his position would get about £8 or £9 a month.

The Court granted a decree for the restitution of conjugal rights, the defendant to return to the plaintiff on or before March 31, failing which defendant to show cause on April 12 why a decree of divorce should not be granted, the plaintiff to have the custody of the child, and the defendant to pay £2 a month for its maintenance till it attains its sixteenth year, leave being reserved to the defendant, however, to apply to have the amount reduced.

[Plaintiff's Attorney, D. Tennant.]

WYLLIE V. W. SPILHAUS AND CO.

{ 1898.
Feb. 10th.

This was an application for an interdict restraining respondents from obstructing the passage or lane known as Fish-lane.

The affidavit of James Wyllie set out;

1. That he was the owner of two properties situated between Strand-street and Waterkant-street, one of which was occupied by

him in connection with his business, and each of which abutted upon the private lane known as Fish-lane, running from Strand-street, which was common to both properties.

2. That the respondent was the owner and occupier of certain premises having a frontage on Strand-street, and extending to Fish-lane on one side and Klipfish-lane on the other.

3. That since respondent's first occupation he had made use of the lane for loading and unloading goods in such a way as to almost totally obstruct the lane for the greater part of the day. One wagon was sufficient to block the lane for the entrance and egress of goods by any other method than that of carriage by hand, and frequently there were in the lane three, four or five of the respondent's wagons of which only one could unload at a time, and even when one only was in the lane, it frequently remained standing at respondent's entrance for very considerable periods.

4. That by reason of this obstruction the applicant found it impossible to despatch his business orders, &c., with promptitude, and his business seriously affected, his customers inconvenienced, and his property depreciated in value.

5. That though he had continually and repeatedly endeavoured to come to some equitable arrangement with the respondent as to the loading and unloading of wagons, the respondent refused to meet him and continued the obstruction.

6. That respondent had an opening into Klipfish-lane which he also used for the purpose of loading and unloading wagons.

The respondent, A. W. Spilhaus (trading as W. Spilhaus & Co.) filed an affidavit in which he stated that Fish-lane was a public thoroughfare, having a granite gutter running down the centre: that at present two wagons could only pass one another with difficulty, but that if the granite gutter were replaced by a shallower one, and the centre not so much depressed, the width of the lane would be sufficient to allow their passing. He annexed correspondence between himself and the Town Council with respect to the alteration of the gutter. The applicant had consented to contribute towards expense up to the sum of £50, but afterwards withdrew his consent. The respondent was prepared to pay fifteen shillings for every pound spent by the Council, provided his contribution should not exceed £151. He denied that he had caused any obstruction or had used the lane in any other than a legitimate manner.

Further affidavits were filed by the respondent's employés in support of his statements.

Mr. Innes, Q.C., appeared for the applicant, and Mr. Schreiner, Q.C., for the respondent.

Mr. Innes: It is not quite clear whether the lane is a private lane or a public thoroughfare, but even if it is vested in the Town Council as a public thoroughfare in terms of the Town Council Act, it must be looked on as a private lane for the purposes of this application. The police will not give the applicant any assistance because they look upon it as a private lane. *Voet* (8, 2, 18) says that where two persons have a common entrance court neither of the co-owners can obstruct or diminish the use of the other. The same principle will be observed in this case. *Colonial Government* v. *Raphael* (7 Sheil, p. 389); *Smith* v. *Gabier* (2 Sheil, p. 234). The record of the last case shows that it was very similar to this. The respondent has not made a reasonable use of the lane. The applicant has more openings on to the lane than the respondent. We offer to use the lane in turns.

Mr. Schreiner: The traffic might easily be regulated if the proposal to improve the lane were accepted; if the gutter were raised the lane would be level for a width of 13 feet. Each party has a servitude in the lane, and regard must be had to the proportionate volume of traffic. If the lane is a public one, as appears, the remedy is to get police assistance to regulate the traffic.

Mr. Innes in reply.

De Villiers, C.J., said: There is no doubt that this lane in question is a very narrow one, and it is exceedingly inconvenient for two persons to use it at the same time; and there is no doubt also that each party has been a great inconvenience to the other on several occasions. At one time Mr. Wyllie has been an inconvenience to the respondents, and at another they have been an inconvenience to him. But, in my opinion, it is not a case for an interdict. An interdict would only be granted where there was an actual obstruction. Now, upon the evidence before me, I cannot find that upon any occasions the respondents have made an unreasonable use of the lane. The respondents' traffic in this lane is very much greater than that of the applicant, and in consideration of this, they offered to bear the greater portion of the expense for the purpose of raising the lane in the centre and taking away the gutter, which would, no doubt, have the effect of enabling two wagons to pass each other much better than they could at present. Well, at one time Mr. Wyllie himself agreed to this. He agreed to pay £50, while the respondents were prepared to pay a reasonable share of the expense, which Mr. Wyllie objected to. As I said, unless there is a clear case of an unreasonable obstruction by the respondents, I do not think the Court ought to interfere, because it is one of the first principles of interdicts that the wrong shall be clearly established. In the present case it is not a wrong. There is an inconvenience, no doubt, but that is incidental to the nature of this lane, and the inconvenience might be shown by one side as much as the other. The only point in favour of the applicant's contention was the point in regard to five wagons standing in the lane. No doubt Mr. Wyllie cannot be expected to wait until five wagons are cleared before his wagons come in, and if he had then asked the respondents to remove, after unloading one wagon, so that his wagon might come in, and if they had refused, undoubtedly there would have been a case, because that would have been an unreasonable user; but it does not appear that he ever asked the respondents, and certainly on one occasion the offer was actually made to him by the respondents that they would remove their wagons so that his own wagon might come in. and instead of accepting this offer, which in my opinion was a reasonable one, Mr. Wyllie backed a wagon into the lane in front of the other wagons, and prevented the respondents' wagons from coming out. I think that it is not a case for the application of an interdict. If he chooses to bring an action he can do so, but on the motion the Court will not allow an interdict. The application must be refused with costs.

[Applicant's Attorneys, Messrs. J. & H. Reid & Nephew; Respondents' Attorney, C. C. Silberbauer.]

GLADSTONE V. GLADSTONE.

Mr. Buchanan applied, on behalf of the husband, for a decree of divorce, the defendant not having returned to the plaintiff by the date ordered.

The application was granted.

BERRANGE V. THE METROPOLITAN AND SUBURBAN RAILWAY COMPANY, LIMITED.

Mr. Graham applied to the Court to fix a day for the trial of the above cause by jury. The case was one for £3,000 damages for injuries received on the defendants' line in a railway collision, which occurred on June 21 last.

The Court fixed March 3 as the date for the trial.

Ex parte THE EXECUTOR OF SIR CHARLES MILLS.

1898.
Feb. 10th.
„ 14th.

This was an application for a rule *nisi* calling on all persons claiming any interest in certain land at King William's Town to show cause why title to it should not be granted to the representatives of the late Sir Charles Mills.

The affidavit of H. M. Arderne, executor dative of the late Sir Charles Mills, alleged that title to the land in question had never been issued, but that it had been originally selected in 1858, by one Major Wolfahrt: that in the "Government Gazette" of the 18th April, 1879, a notice was published to the effect that certain erven, including the land in question had been applied for by the Borough Council: that on the 1st May, 1879, the late Sir Charles Mills pointed out by letter that Major Wolfahrt had never forfeited the land, and that the deceased held his power of attorney to receive title; that since that date nothing further appeared to have been done in the matter; that the deceased in his communications to his agent in this colony repeatedly stated that he had bought the property from Major Wolfahrt, but deponent had been unable to trace any documentary evidence to prove the purchase or the power of attorney referred to: that deponent had been unable to get any further information about Major Wolfahrt than that he left the Colony many years ago and is believed to be dead: that the deceased appeared to have been in peaceful and undisturbed possession of the property since 1862, and had paid rates and taxes upon it; that correspondence has passed between the deponent's attorneys and the Surveyor-General in connection with the matter, which correspondence was annexed, but the Surveyor-General had stated that the Government did not consider the evidence of ownership sufficient to warrant the issue of title and suggested an application to the Supreme Court; that receipts show that from 1874 up to the present date the borough water and house rates have been paid by deceased, or his agent or the occupier under him, and the Divisional Council rates since 1880 also by deceased or his agent.

An affidavit by L. Gerardi supported the above affidavit and stated that the deceased had informed him that he had bought the property from Major Wolfahrt for £200: further, that since 1862 he had treated the property as his own, let it to certain people, and been in uninterrupted possession.

Augusta Bode, generally known as Augusta Mills, stated on affidavit that at the request of the deceased she had entered into occupation of the cottage on the said property in 1873 and had resided there up to the present time; that he had informed her that he had purchased the property and that on his death it would devolve upon her; in consequence of that assurance she had in 1886 erected a brick building thereon at a cost of £230.

Further affidavits were put in showing that rates had been paid on the property by Sir Charles Mills.

Mr. Searle, Q.C., appeared for the applicant.

The Court intimated that it should like to know the nature of the power given to Sir Charles Mills and see the letter of the 1st May, 1879.

Postea (February 14th.)

De Villiers, C.J. said: This case stood over for some correspondence between Sir Charles Mills and the Government to be put in. But that correspondence does not decide the case with regard to Sir Charles Mills. If in 1879 Sir Charles Mills held a power of attorney from Major Wolfahrt, he could hardly claim the title by prescription. The only other way in which the title can be claimed is by contract, but there is no proof of any contract: no agreement to sell has been put in, no declaration of purchaser and seller, and no proof that transfer has taken place. Under the circumstances no order can be made by the Court.

Buchanan, J., in concurring said: The Derelict Lands Act cannot apply in this case. I may express the opinion, however, that the Government should not disturb Mrs. Bode in her possession, and if she occupies for a few more years then perhaps the property may be acquired by prescription,

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

IN THE MATTER OF THE MINORS COETZEE.

Mr. Close applied for leave to raise a loan of £100 to meet the expenses of sub-hiring certain farms and for other purposes.

The Court granted the order, subject to the Master's approval.

BRINK V. THE ATTORNEY-GENERAL.—*In re* REGINA V. BEN DESI AND HALLAM KULU. { 1898. Feb. 10th.

Criminal appeal—Expiration of time allowed—Act 21 of 1876, section 4.

This was an application on notice by the attorney for Ben Desi and Hallam Kulu, calling upon the Attorney-General to show cause why leave should not be granted to the appellants to set down the above matter for argument, notwithstanding that the time prescribed by law for prosecuting the appeal had elapsed.

The facts were briefly these: On the 19th November last the appellants were convicted at Lady Frere and fined £5 each or thirty days' imprisonment with hard labour for contravening Regulation 19, framed under section 10 of Act 25 of 1894, by ploughing or otherwise injuring the commonage of the Buffel Doorns Location.

An appeal was noted, but it was not prosecuted within forty-one days as required by Act 21 of 1876, section 4, nor had notice of the appeal been given to the Attorney-General.

The local attorney, who conducted the defence, alleged, in justification of the delay in prosecuting the appeal, that at the conclusion of the case he waited upon the Resident Magistrate, and on behalf of the accused requested that a copy of the proceedings might be sent to him at Molteno: that thereupon the Acting Assistant Resident Magistrate informed him that they were pressed for time in the office, and suggested that the services of one D. Malassi should be obtained to copy the proceedings.

That he engaged the services of Malassi, but only received the copy of the record from him on 7th December.

That he immediately prepared the case and brief, and transmitted same to his Cape Town attorney on the 18th December, with instructions to notify same to the Attorney-General in order to have the case set down for argument.

That the circumstances connected with the delay in prosecuting the appeal were solely attributable to the copy of the record being delayed in transmission to him from Lady Frere, and further, that he found it impossible to prepare the case for counsel to argue, as the facts supporting the plea of prescription were such as required great consideration, and it was utterly impossible to have completed same before the 12th Dec., in order to have the matter set down for argument on that day. The Cape Town attorney (the applicant) alleged that he only received the copy of the record on the 23rd December.

Mr. Graham was heard in support of the application. In *Snyders* v. *Theron* (3 Sheil, p. 420: 10 Juta, p. 309), leave to appeal was refused, but there appears to have been no notice of appeal in that case, nor was there any explanation of the delay.

Mr. Sheil (for the Attorney-General): I rely on the terms of Act 21 of 1876 and *Snyders* v. *Theron*. There has been the greatest negligence on the part of the attorneys in having the record copied. But even if not copied the appeal could have been set down for the last day of the November term.

Mr. Graham: *Smith* v. *Pinto* (1868, p. 105); *Regina* v. *Herman and another* (1 App. Ca., p. 316).

De Villiers, C.J., said: The terms of the Act of Parliament are as clear and precise as anything could be, and even if this were a case in which some kind of discretion might be allowed, it is not a case in which that discretion should be exercised, seeing that there has been great negligence on the part of practitioners in prosecuting the appeal. The application must be refused.

[Applicant's Attorney, P. M. Brink.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice BUCHANAN.]

MALCOLM V. SHAW. 1898. Feb. 14th.

Trespass—Damages.

This was an appeal from a decision of the Resident Magistrate of Queen's Town in an action in which the present respondent was plaintiff, and sued the appellant for the sum of £7 8s. 4d. in respect of damages sustained by trespass and injury to crops. The defendant pleaded that he entered on the land in question by leave and licence of the plaintiff, and to dig up certain potatoes there growing planted by himself, in the cultivation of which he had expended moneys subsequent to the leave and licence so granted. He claimed in reconvention for £1 10s. damages in consequence of the plaintiff preventing him from reaping his potato crop.

The evidence showed that the plaintiff hired a house, and entered into occupation on the 3rd November: the defendant had been the tenant until the end of October, and before his tenancy expired the plaintiff gave him leave to water and reap the potatoes which had already been sown by him. The servants the defendant sent to water them became a nuisance to the plaintiff, and he sent a letter to defendant on the 12th November, giving him until the 24th to reap his potatoes. The defendant refused to do so, and stood upon his right to take them whenever they were ripe. On the 30th plaintiff found defendant's servants digging up potatoes, and warned them and defendant off the place. The defendant declined to go and a disturbance resulted, and the police were called in. Immediately afterwards plaintiff reaped the potatoes, which were not well advanced, and amounted to one bag. He said it was worth less than 10s. He alleged damages sustained through legal expenses, having to leave his business, damage caused by the crowd which collected, and injuries to the health of his wife and a lady visitor.

The defendant alleged that he had spent 6s. or 7s. on watering the potatoes, and that the plaintiff did not offer to refund the amount. He estimated that he should have got three bags of potatoes.

The Magistrate gave judgment for the plaintiff for the full amount claimed, on the ground that the consent to reap had been withdrawn and that defendant had trespassed and created a disturbance, and instigated his servants to resist and assault the plaintiff.

Against this judgment the defendant appealed.

Mr. Innes, Q.C., appeared for the appellant.

Mr. Close for the respondent.

After hearing Mr. Innes, and without calling on Mr. Close,

De Villiers, C.J., said: The potatoes had been sown by appellant and he asked permission after his lease had expired to reap them. The incoming tenant gave that permission, but afterwards he found that appellant's boys working in the garden were an inconvenience, and he gave fair notice to appellant on November 12 that the time for the removal of the potatoes would be limited to November 24. That was a fair limit of time to remove these potatoes. There is no evidence that these potatoes would have been valueless on November 24, nor is there evidence that any expenditure thereon had been incurred by the appellant before November 12, except the value of the seed potatoes. Therefore the incoming tenant was entitled to damages against the appellant for the trespass upon the property. The only question is whether the damages are not somewhat excessive. Possibly if the case had been before this Court the damages may have been less, but I think that hardly a fair test to apply in this action. It is clear that fair notice had been given to appellant that he was not to go upon the property after November 24. Notwithstanding that, he went with three coloured men and forced himself upon Shaw's property against the latter's will. Not only that, but according to his own admission he told one of his men that he was justified in striking if an attempt was made to eject him. Appellant told the man not to do so; but if you tell a Kafir boy that he will be justified in striking, but that he is not to do so, we all know what that means. The Kafir would take one part of the advice sooner than the other. Mr. Innes contended that the boy did not follow that suggestion, but it is certain that the trespass might have led to a very serious breach of the peace. Therefore it may have seemed to the Magistrate that the trespass was so wilful as to justify him in his decision. I do not think the Court can alter that decision. The appeal must be dismissed.

Mr. Justice Buchanan concurred.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorney, C. W. Herold.]

GOUSTYN V. VAN PUTTEN.

1898.
Feb. 14th.

Promissory note payable on demand— Letter of demand—Post—Direction—Tender—Costs.

A demand by post for the payment of a promissory note payable on demand, should be by letter, prepaid and properly directed, and the direction is not complete if only the name of the farm on which the maker resides is given, and not the post-office nearest the said farm or the post-office at which the maker usually receives his letters.

This was an appeal from a decision of the Acting Assistant Resident Magistrate of Clanwilliam in an action in which the present respondent sued the appellant upon a promissory note for £15 2s. and costs, and obtained judgment. The defendant appealed on the question of costs only.

The evidence showed that the defendant, who was a farmer residing at Rhoodeklipheuvel, had signed a promissory note for £13 18s. in favour of the plaintiff, payable on demand. No demand was made upon him until the plaintiff's attorney wrote a demand on the 23rd November giving ten days' time for payment and three days' grace in addition. This letter was addressed to Rhoodeklipheuvel without any addition of post-office or district. The demand was posted at Clanwilliam, and bore the postmark 25th November, and another Clanwilliam postmark 30th November. A third postmark was "Van Putten's Vallei, December 5th." Letters addressed to Rhoodeklipheuvel generally went to Van Putten's Vallei, and were conveyed to the farm when an opportunity arose. The defendant received the demand on the 7th December, and immediately went to the plaintiff and tendered the money, but the plaintiff refused to accept it as he had already given instructions to sue. The defendant admitted that if he had received the demand on the 5th, he could easily have come to town and paid the amount before three p.m. on the 7th, which was the time at which the summons was issued. The Magistrate, in his reasons for judgment, held that the defendant had shown neglect in not calling for his letters at Van Putten's Vallei on the usual and only post day they had in the week. Van Putten's Vallei was six hours from Clanwilliam.

Mr. McGregor appeared for the appellant; Mr. Close for the respondent.

Mr. McGregor: Rule of Court 312 subsection 1 (*c*), requires proper direction of a demand. Here there was no proper direction.

[De Villiers, C.J.: That rule does not refer to a demand for payment of a note payable on demand.]

The demand should be directed to the post-office nearest to the defendant's residence. *Bigelow on Bills of Exchange* (pp. 136, 137). The demand as posted was no due demand. A copy of the note should have been sent with the demand. This objection was not taken at the trial, but it can be taken now. As to costs, *Brink* v. *Gough* (2 M., p. 265 or p. 270): *Steytler* v. *De Villiers* (2 M., p. 286 or p. 300.)

Mr. Close: The appellant was negligent in not calling for his letters. The address is ample, considering the circumstances of the country. There is no postmark of any other office on the letter: therefore it is improbable that it went elsewhere. The respondent should not suffer for any *laches* or delay which may have occurred in the post-office. The English authorities are clear as to that.

Mr. McGregor in reply.

De Villiers, C.J.: The defendant was sued in the Court below on a promissory note for £13 18s., payable on demand. On the 24th November last, a demand was sent by letter, duly stamped and posted, and directed to "Mr. Goustyn" (the defendant) "Roodeklipheuvel." This is the name of the farm on which the defendant resides, but there is no post-office on the farm. There probably are many farms in the Colony with the same name. The post-office to which the defendant's letters are generally addressed, and where he generally calls for them is Van Putten's Vlei, which is also the nearest post-office to his farm. Clearly, therefore, this was the post-office to which this letter of demand ought to have been addressed. The letter was not properly directed and the result was that it only reached Van Putten's Vlei on 5th December. The defendant only received it on the 7th, but assuming that he ought to have received it on the 6th, his tender of the amount of the note to the plaintiff at the plaintiff's farm appears to me to have been within a reasonable time. The Magistrate ordered the defendant to pay the costs of the action, but seeing that the tender was duly made, this portion of the Magistrate's judgment must be set aside, with costs of appeal.

Buchanan, J., concurred.

[Appellant's Attorneys, Messrs. Walker & Jacobsohn; Respondent's Attorney, P. M. Brink.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice BUCHANAN.]

WAR DEPARTMENT V. CURLING. 1898. Feb. 15th.

This was an application to have a rule *nisi* granted by the Chief Justice made absolute. The rule was for an interdict restraining the defendant from keeping certain night-soil carts on certain property which was registered in the name of her husband. This property was in close proximity to the regimental camp at King William's Town, and it was alleged that the carts being placed there endangered the health of the troops and others, enteric fever having broken out and several deaths having been caused thereby. There were several cases of fever in the neighbourhood.

Mr. Searle, Q.C., appeared for the applicant.

The Chief Justice said the Court would make the rule absolute, reserving to the respondent the right to apply for the discharge of the interdict on due cause.

POGGENPOEL V. POGGENPOEL. 1898. Feb. 15th.

Separation *a mensa et thoro*—Husband and wife—Habitual intemperance.

Habitual intemperance on the part of husband or wife, so long continued as to leave no hope or prospect of reform, is a good ground for granting a decree of separation a mensa et thoro *to the other spouse.*

This was an action brought by Philip Poggenpoel against his wife, Wilhelmina Magdelena Poggenpoel, for judicial separation on the ground that defendant's intemperate habits and consequent conduct rendered it impossible for the plaintiff to live with her.

Mr. Close appeared for plaintiff; defendant in default.

R. D. H. Barry, clerk in the Colonial Office in charge of the marriage registers, produced the certificate of the marriage of plaintiff and defendant on June 22, 1884.

Philip Poggenpoel, the plaintiff, stated that there had been one child of the marriage. About two months after he married defendant he found out that she was of intemperate habits. He knew nothing about that before the marriage. Defendant afterwards became worse. Some years ago they were living in the house of a man named Williams, a tailor, but on account of defendant's conduct Mr. Williams gave them notice to leave. After that they went to live at Rondebosch, and defendant continued her drunken behaviour. They had to leave that house for the same reason as before, the landlord giving them notice on account of defendant's bad behaviour, and the bad company she brought to the place. Altogether they were turned out of different houses six times on account of the woman's conduct. No complaint had ever been made against witness. He had tried his best to reform his wife, and had got her to sign the pledge three times. He always treated her well. When drunk she was violent and cross-tempered, using bad language and swearing. About six years ago she assaulted witness with a knife, and six months ago she threw a vase at him, he having a narrow escape. Witness was now living in a house belonging to Mr. Lancaster. On December 4 last the Rev. Mr. Willemsen, who lived near them, asked defendant to clean out his house. He left her in charge of the house from three to five o'clock. Witness heard that she had broken open a box and taken £2. She was drunk that night. Mr. Lancaster had three times given them notice to leave on account of defendant's behaviour; the last time he had given them final notice. After witness heard of the money being stolen he told defendant he would not live with her any longer, and on December 11 she went away to Maitland to her brother. Witness made her an allowance of 6s. per week after she left, and allowed her to take away some furniture of the value of £10. The value of the furniture he had left was £25. Witness had found it utterly impossible to live with his wife any longer.

Gerrit John Willemsen, missionary of the Dutch Reformed Church at Stellenbosch, said plaintiff and defendant had been his neighbours for three years. Defendant was many times drunk, and on such occasions she got noisy and excited. One day when he left her in charge of his house to clean it he missed on his return £2 from a case. Defendant was not quite sober at the time, and scolded at Mr. Lancaster.

William Lancaster deposed to having to give plaintiff notice to leave his house on account of his wife's conduct. Plaintiff was a quiet, respectable man, but his wife was a very tipsy woman, and when she got drunk brought to the house all the rubbish of Rondebosch. When drunk she used bad language. Witness had never known her to assault plaintiff.

Mr. Close for the plaintiff cited *Van der Linden*, (p. 27); *Kersteman Academie* (p. 146).

[De Villiers, C.J., referred to *Goldsworthy* v. *Goldsworthy* (3 Sheil, p. 134).]

De Villiers, C.J.: There has been no case in which this Court has decided that habitual drunkenness is a good ground for granting separation *a mensa et thoro*, but the principle which underlies all the cases is clear enough. That principle is that if the conduct of one of the spouses is such as to make further cohabitation with him or her wholly insupportable, the other spouse is entitled to the benefit of the decree. It is difficult to conceive of conduct more intolerable than habitual intemperance without any reasonable prospect of reform. One of the books quoted by counsel cites such conduct as one of the grounds for granting a decree of separation in the Dutch Courts, and no case to the contrary has ever been decided in this Court. We are of opinion that the defendant's conduct entitles the plaintiff to have the decree. Drunkenness in her case has been habitual, and has been so long continued as to leave no hope or prospect of reform. The plaintiff has been expelled from six different premises occupied by him and his wife by reason of her outrageous behaviour, and further cohabitation with her would, in my opinion, be intolerable.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

WELT V. WELT. { 1898. Feb. 15th.

This was an action for divorce, brought by Martha Elizabeth Ann Cook Welt (born Coetzee) against her husband, Herman Welt, on the ground of his adultery.

Mr. Graham appeared for the plaintiff,

Mr. Molteno appeared on behalf of Mr. Eilenberg, a merchant in Cape Town, and asked permission to put in an affidavit on his client's behalf. As far back as November last it had been stated in an affidavit put in in these proceedings that Eilenberg was the channel whereby the bulk of the property in the estate, which was held by plaintiff and defendant in community of property, had passed away to Europe. There was no explicit charge, but Eilenberg wished to make clear the part he had taken in the transaction.

In answer to the Chief Justice,

Mr. Graham said it seemed to him to be absolutely unnecessary. It appeared that during the earlier proceedings in the suit an affidavit was made, stating that certain property belonging to the joint estate had been sent to Europe through Mr. Eilenberg. There was no allegation of guilt or complicity, and it was not for one moment desired to make any allegation against Mr. Eilenberg.

Mr. R. D. H. Barry produced the marriage certificate of the two parties. They were married on August 1, 1887.

Martha Elizabeth Ann Cook Welt stated that she was married in community of property to defendant. The photograph produced was that of her husband. After marriage they resided at Tulbagh. She and her husband had no means when they married. They started a general dealer's business at Tulbagh, which they carried on until the end of 1895, when they sold it to Messrs. Merrington & Adams for £2,200. Witness assisted in the business. She was bookkeeper and saleswoman, and virtually managed the business. They started business again at Hermon Station. In May last year witness's husband left for Europe, expressing his intention of returning in September or October. When he left witness had no idea that he was taking the bulk of the property in the estate with him. He left witness a power of attorney to collect outstanding debts. He had previously himself collected between £800 and £900. Witness had since ascertained that before he left he sold the Hermon property for £1,700. He had one or two stands at Johannesburg, but witness did not know what had become of them. Another property he had sold for £250. The value of the property in the estate must have been between £5,000 and £6,000. Witness and her husband had lived happily, with the exception of a little trouble four years ago. Witness's suspicions of her husband's unfaithfulness were aroused through a telegram she received from Mr. Nathanson, asking her to come to Cape Town. She did so, and afterwards on a second visit she saw the man named Isidore Davis, and from what he told her the present proceedings had been taken. She was not acquainted with either Nathanson or Davis before that time. There was one child of the marriage, a girl about ten years old, of whom witness desired to have the custody. After her husband left she received several letters from him (produced). In answer to one of these she forwarded him a further sum of £50. One letter, written in a Hebrew dialect, which defendant had sent to his brother, had come into witness's possession. Part of that had been translated to her. (The letter and translation were put into court. In it defendant said that his brother must try and get some more of the money out of his wife. He was sorry he had left her with so much. He advised his brother to come to Breslau as soon as he was worth £3,000, for he could live there like an Emperor.)

By the Chief Justice: Witness was now living at Tulbagh. She had some of the property — about £40 — in her possession now.

Isidore Davis said he lived in Vandeleur-street, a few doors from Mr. and Mrs. Nathanson's. He knew Herman Welt, and recognised the photograph produced as Welt's. In March last, between eleven and twelve o'clock, witness was returning home from witnessing a fire, when he noticed a light in what he knew to be the bedroom of Mr. and Mrs. Nathanson. Witness knew Mr. Nathanson was away from home, and hearing a conversation going on in the room he looked through a crack in the shutter and saw defendant with Mrs. Nathanson on his knee. Witness then described their subsequent conduct.

The Court granted a decree of divorce with costs, plaintiff to have custody of the child of the marriage. A division of the property was ordered, Mr. Adams being appointed receiver.

Mr. Molteno then read the affidavit of Mr. Eilenberg, which went to show that he and defendant had had business relations together. All he had had to do with sending money in the estate away to Europe was giving defendant a draft when he left so as to save him bank charges. To the best of Eilenberg's knowledge, defendant intended to return to the Colony, and there was no prospect of the present lawsuit at that time, defendant and plaintiff being on the best terms, and the lattter going to the ship to see the former off. He had received no money in the estate since defendant left.

On the motion of plaintiff's counsel,

The Chief Justice said a fresh interdict would be granted restraining Eilenberg from parting with any money belonging to the estate in his possession, save to the receiver appointed.

[Plaintiff's Attorneys, Messrs. Walker & Jacobsohn.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and Hon. Mr. Justice BUCHANAN.]

REGINA V. BOVENSTAANDE. { 1898. Feb. 17th.

Female prisoners - Reformatory.

The Chief Justice said a case had come before him for review, in which F. Bovenstaande was charged before the Resident Magistrate of Carnarvon with stealing a silver watch, and being found guilty, was sentenced to be confined within the precincts of the gaol for one week and thereafter to be detained in the Porter Reformatory until she reached the age of sixteen. He had caused inquiries to be made as to whether there was any provision in the Porter Reformatory for females, and had ascertained that there was not. The Magistrate himself said he was under the impression at the time that provision for females did exist at that reformatory. Therefore that part of the sentence would be expunged.

Mr. Justice Buchanan said that was another case pointing out the desirability of establishing a reformatory for young females. In the discharge of his duties he often had great difficulty in dealing with girls convicted before him, the only place where any provision was made for the detention of such being the House of Correction, and that was not a reformatory.

ADMISSIONS.

Mr. Buchanan applied for the admission of Abraham Albertus During as an attorney and notary of the Court.

The application was granted and the oath administered.

Mr. Close applied for the admission of Gabriel Russouw as an attorney and notary of the Court.

The application was granted and the oath administered.

PROVISIONAL ROLL.

LAWRENCE V. DIETERLE.

Mr. Molteno applied for provisional sentence for £399 5s., less £150 paid on account, being money due on a promissory note.

Granted.

Mr. Molteno further applied for judgment, under rule 329, sub-section (*d*), for £22 16s. 1d., with interest *a tempore morae*, being the sum of two premiums paid on a life policy held as security.

Granted.

CHEEVERS AND OTHERS V. COURTIER.

Mr. Currey applied for an order for the final adjudication of the defendant's estate.

Granted.

SMITH V. BEER. { 1898. Feb. 17th.

This was an application for the compulsory sequestration of defendant's estate.

For the plaintiff it was stated that he was employed by A. R. McKenzie & Co., and to enable defendant, who was a fruiterer and greengrocer, to release some potatoes, he endorsed on behalf of the firm employing him two cheques of the amount of £1,000. The cheques were afterwards dishonoured, and being repudiated by A. R. McKenzie & Co., plaintiff had to take up the cheques himself. Plaintiff stated that he saw the only way to recover the money was by getting the inspection of the business under his own control, and to that end obtained a power of attorney from defendant, and had a man engaged in the business. Plaintiff, however, had no interest in the business, did not derive any profit therefrom, nor was he in any way responsible for any loss. Defendant said that after all the matters were settled he would out of gratitude give plaintiff an interest in the said business, but that was an after consideration. Plaintiff denied that he was a partner in the said business. Since the business had been carried on under plaintiff's inspection the books had been well and carefully kept. Previous to that, however, the books had not been so well kept, and it was impossible to ascertain exactly the state of affairs ; but it appeared that the liabilities were about £1,800, and the assets about £1,000 less. Plaintiff stated that he had every desire that the business should be kept going, but he felt compelled to seek sequestration, owing to the reckless way in which the defendant was conducting the business. The plaintiff had offered to assign his business to his creditors on certain terms, to which plaintiff could not accede, and defendant had thereupon withdrawn the power of attorney previously granted.

For the defendant it was contended that after the affair of the cheques plaintiff agreed to let the money remain in the business, on condition that he secured a half-interest in the said business. That being so, plaintiff could not sue for compulsory sequestration on the ground of that money being owing. It was further contended that Act 38 of 1884, under which the proceedings were taken, required that insolvency should be clearly proved before compulsory sequestration was granted. It was asserted that that was not conclusively proved.

Mr. Molteno for the plaintiff.

Mr. Buchanan, for the defendant: Under Act 38 of 1884 the clearest proof of insolvency is required. *Prince* v. *Klosser* (9 Juta, p. 130).

The Chief Justice said: The documentary evidence in this case tends to show that the plaintiff was a supervising creditor, not a partner. The plaintiff took upon himself the responsibility for a large sum of money on behalf of the defendant, and for the purpose of securing that got a power of attorney from the latter. The power of attorney said nothing about partnership, and a letter written by defendant to the manager of the Standard Bank also says nothing about a partnership, but puts plaintiff merely as supervising creditor. In the face of the documentary evidence it is difficult to hold that any such partnership is intended. I cannot conceive how such partnership could have existed if afterwards defendant agreed to assign his business, as he clearly did. Clearly no partnership existed, and if that is so it is quite clear that the defendant is hopelessly insolvent, the assets, according to the statement, being less than half the amount of the liabilities. It would be better for all the creditors that the estate should now be placed under compulsory sequestration. The order will be granted.

Mr. Justice Buchanan concurred.

[Plaintiff's Attorneys, Messrs. W. E. Moore & Son: Defendant's Attorney, J. Ayliff.]

REHABILITATION.

Mr. Ward applied for the rehabilitation of the estate of William Augustine Hampson.

Owing to a paragraph in the trustees' report regarding certain payments which had been made to insolvent since the schedules were prepared, the application was ordered to stand over until explanation on that point was obtained.

Postea (March 8th).

The rehabilitation was granted.

GENERAL MOTIONS.

DOLF V. DOLF.

Mr. Close applied for a rule *nisi* granted in this case for leave to sue *in forma pauperis* to be made absolute.

Granted, Mr. Close being appointed counsel in the case.

FAURE V. FAURE.

Mr. Close moved that the rule *nisi* calling on the defendant to show cause why the plaintiff should not be allowed to sue *in forma pauperis* for divorce be made absolute.

Granted.

In re THE MINOR HESTER JOHANNA MICHAU.

Mr. Buchanan applied for an order confirming the sale of certain land in the above estate, such sale being in the interest of the minor.

The order was granted in terms of the Master's report.

TAYLOR V. TAYLOR.

Mr. Searle, Q.C., applied on behalf of the plaintiff for leave to sue by edictal citation for restitution of conjugal rights.

The petition stated that defendant had deserted plaintiff about twelve years ago, and when last heard of had gone to Rhodesia. His present whereabouts were unknown.

Order granted, personal service if possible, failing which the citation to be published in the "Bulawayo Chronicle."

DE KOCK V GIE AND ANOTHER.

Mr. Graham applied for removal of cause for trial before the High Court of Griqualand West. The plaintiff resided at Belmont, in the province of Griqualand West. The defendant resided in the province, as did three of plaintiff's principal witnesses. The defendant Gie had consented to the removal to the High Court of Griqualand West.

Granted.

In re THE MINOR BLIGNAUT.

1898.
Feb. 17th.
April 12th.

Mr. Schreiner. Q.C., applied for an order authorising the payment of certain money out of the Guardians' Fund, and for leave to raise a loan on mortgage of the minor's property.

The petitioner in the case was the minor's father and guardian. In terms of a joint will made by him and the testatrix, his first wife, who died in 1892, the immovable property in the estate was bequeathed to the children, subject to a life interest in favour of the survivor. The petitioner had expended a sum of money in connection with the estate, and it was necessary that he should spend a further sum of £200, in joining with neighbouring proprietors in having a conduit made for the irrigation of the estate. By the terms of the will however no money could be raised by mortgage on the property, nor could any part of it be sold. The Master had reported on the matter.

Mr. Schreiner, Q.C.: The Court might allow the petitioner to elect whether he should repudiate his interest and take only his half or abide by the will. *Klopper* v. *Smit* (9 Juta, p. 167).

No order was made, but the Court ordered the matter to be referred back to the Master to see whether it would be in the interests of the minor to allow petitioner to repudiate his interest in the will, thus allowing a half share of the estate to be transferred to petitioner on his own behalf, and the other half transferred to his name on behalf of the minor.

Postea (12th April.)

Mr. Close renewed the application.

A further report from the Master was put in, stating that the petitioner had only now taken out letters of administration as executor. but had to all intents and purposes adiated under the will, for he had been in possession of his wife's estate since her death. The Master stated also that he was still of opinion that it would be more to the benefit of the minor to allow petitioner to take an undivided half-share of the joint estate, and to transfer the other half-share of the landed property to the minor, and to pay her portion of the movables into the Guardians' Fund.

The petitioner also filed a further affidavit, to the effect that he was an ignorant farmer, and had continued in possession of his wife's estate, and accepted the benefits thereof, in ignorance of his legal rights and the force of such action.

An order was made in terms of the Master's report.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

ESTATE OF THE LATE N. J. MARINCOWITZ.

Mr. Molteno applied for leave to raise a loan of £460 to pay off the debts of the estate.

Order granted.

LOFTHOUSE V. LOFTHOUSE.

Mr. Graham applied on behalf of the plaintiff in this action for divorce, for the case to stand over until the end of the term owing to the illness of an important witness.

Granted.

COHEN V. ENGELBRECHT.

1898.
Feb. 17th.

Costs.

This was an appeal from a judgment of the Resident Magistrate of Clanwilliam in a case in which the appellant sued the respondent for the sum of £10 17s. 7d. Judgment was given for plaintiff for £9 1s. 2½d., but the Magistrate ordered each party to pay their own costs, on the ground of plaintiff not having succeeded in recovering the full amount claimed. It was contended for the defendant that a tender was made, but this was denied on behalf of plaintiff, who it was stated would have accepted less than the amount claimed if it had been tendered.

Mr. Close cited *Kirsten* v. *Van Noorden* (1879, p. 232) for the appellant.

The Chief Justice said that because plaintiff had asked for more than he was entitled to, that was not sufficient to make him lose his expenses. It was stated that £9 1s. 2½d. had been tendered, but that was only after costs had been incurred. It was therefore only right that the appeal should be allowed and judgment entered for £9 1s. 2½d., with costs in that Court and in the Court below.

[Appellant's Attorney, P. M. Brink.]

SUPREME COURT

[Before the Right Hon. SIR J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice BUCHANAN.]

KARK V. KREMER. { 1898. Feb. 18th.

Power to sue—Magistrate's Court.

> *The defendant's agent in a Magistrate's Court took exception to the power filed by the plaintiff's agent, which authorised the latter to take proceedings against the defendant but was headed "in the Supreme Court."*
>
> Held, *affirming the Magistrate's decision, that the exception was a good one.*

This was an appeal from a judgment of the Assistant Resident Magistrate of Cape Town, delivered on January 6, in an action in which Isaac Kark (the appellant) sued Saul Kremer (the respondent) for £10 damages for trespass on his (Kark's) property in Horstley-street, Cape Town, by having, himself or through his servants, opened up the ground of the said property, and laid a drain pipe there. The defendant (Kremer) had since admitted that he had done so in ignorance, and had already restored the ground to its original condition, and further promised to make amends; but he had neglected and refused to do so. The case first came before the Resident Magistrate on December 20 last, and was postponed to the Assistant Resident Magistrate's Court. After a further postponement, it was heard on January 6. Defendant's agent took exception to the summons on the ground that it had been issued on a power of attorney which had been improperly executed. On the trespass being brought to the plaintiff's notice he was residing in Johannesburg, and sent this power to Mr. C. W. Herold, who held his general power of attorney. The power was signed in blank, and was headed "In the Supreme Court." Mr. Herold handed it to Mr. Wrensch, who filled in his own name as agent, and the nature of the action, and thereupon took out a summons in the Magistrate's Court in Cape Town. The Assistant Resident Magistrate held that the power was improperly executed, and that Mr. Wrensch could not be held to be the lawful agent of the plaintiff, inasmuch as the power was signed in blank, and there was nothing when it came into Mr. Wrensch's hands to show for what purpose, as well as with what intention, it had been signed by plaintiff. No power of attorney, made in favour of Mr. Herold had been produced, and it was clear that the proceedings were instituted under, and by virtue of, the power in favour of Mr. Wrensch.

The form of the power was as follows: "In the Supreme Court.—I, Isaac Kark, do hereby ordain, nominate, and appoint John Fredrik Jacob Wrensch to be my lawful attorney and agent for me, and in my name to institute proceedings and claim a judgment against Saul Kremer for £10 damages, &c."

Mr. Graham for the appellant: There was sufficient material before the Magistrate to enable him to see who was to be sued, and that the plaintiff had given authority to his agent here to sue.

Mr. Buchanan for the respondent: Act 20 of 1856, Schedule B, section 7, makes express provision that a summons shall not issue except upon the application of the plaintiff himself or his lawful agent.

[De Villiers, C.J., referred to *Denyssen* v. *Botha* (1869, p. 74).]

In that case there was a ratification. A general power is ineffectual when a special power has been provided for by law. In this power the two essentials have been omitted, viz., the person delegated and the nature of the action. The plaintiff's letter shows that he did not intend this form of action to be taken, nor that the power should be used in the Magistrate's Court. His intention was to stop the encroachment. Schedule B, section 13, shows that the person authorised to appear must be a particular person designated under the plaintiff's hand. In *Basson's Trustee* v. *Wiese's Trustees and Others* (1869, p. 12), a blank power of attorney was held to be no power at all. An invalid document cannot be ratified. The ratification itself implies that there was an irregularity, and if so the defendant was entitled to take exception to it.

Mr. Graham: An application to amend was made and could have been granted under Act 20 of 1856, section 50.

De Villiers, C.J.: The judgment of the Court below must be sustained, but not on the grounds stated by the Magistrate. The substantial objection to the power of attorney filed by the plaintiff's agent is that it gives no authority to him to proceed in the Magistrate's Court. It appoints Wrensch as his lawful attorney to institute proceedings in the plaintiff's name, but it begins with the words "In the Supreme Court." It is an authority therefore to sue in this Court and could not be used as an authority for suing the defendant in the Court below. In dismissing the appeal with costs, I would express the hope that the case may be a warning to practitioners to be more careful and precise in the drawing of legal documents than they generally are.

Buchanan, J., concurred.

[Appellant's Attorney, C. W. Herold: Respondent's Attorney, J. Ayliff.]

In re BEER'S INSOLVENT ESTATE. 1898. Feb. 18th.

Mr. Molteno applied for the appointment of a provisional trustee in the insolvent estate of Beer. The petition set forth that the estate consisted chiefly of perishable goods, fruit and farm produce, which it was desirous there should be power to sell. There was an affidavit made by creditors representing £1,500 out of the total liabilities of £1,804, consenting to the appointment of the said James Smith as trustee. Smith was the creditor upon whose petition the estate had been sequestrated (see p. 29, *supra.*)

The Chief Justice said it was a case in which an independent trustee should be appointed. It was a case in which an independent person should investigate the whole state of affairs.

At a later stage,

Mr. Molteno applied for the appointment of Mr. G. W. Steytler as provisional trustee, with power to sell the perishable articles and collect the debts.

Application granted.

FISHER v. HARRISON. 1898. Feb. 18th. March 8th. " 9th.

Sale—Specific goods—*Periculum rei venditae*—Interdict.

In the absence of fraud the purchaser of goods, for future delivery, which have not been pointed out to him or set apart for him is not entitled to an interdict restraining the seller from removing from his premises goods of the same kind as those so purchased from him.

Mr. Graham applied on behalf of John Fisher for an interdict preventing W. Harrison from removing certain bricks.

The applicant's affidavit alleged that on the 5th February last he purchased the bricks from one McInnes, the authorised manager of the respondent, and paid the latter £25, receiving the following receipt: "Received from J. Fisher the sum of £25 sterling, on account of 200,000 bricks, consisting of blue hards, red hards, and seconds, at the rate of 40s. per 1,000 at the kiln, one kiln to be ready on or before Monday, February 14, 1898; the remainder to be ready for removal at the rate of 10,000 per day after the above date.—For W. Harrison, J. W. McI."

That McInnes pointed out at the time one large kiln, which he arranged should be delivered as soon as the burning was finished, viz., about the 14th February. That on the 15th February he wished to take delivery, but the respondent refused to deliver the bricks or refund the £25, and repudiated the sale. Further that respondent had broken into the kiln and was carting the bricks away.

The Chief Justice pointed out that there were four kilns mentioned in the receipt, the bricks in one of which were to be ready on February 14: how was the particular kiln, from which it was wished to interdict bricks being taken, to be identified?

Counsel said he had not been instructed on that point.

The Chief Justice said more information would have to be obtained before an interdict could be granted: neither did he see his way clear to make a rule. If Mr. Graham wished to apply again he should give notice.

Postea (8th March.)

Mr. Schreiner, Q.C., renewed the application upon a notice calling on the respondent to show cause why an order should not be granted restraining and interdicting him from removing certain bricks forming part of a kiln which the applicant alleged had been sold to him, pending an action to be brought by the applicant.

The respondent filed affidavits denying the authority of McInnes to sell on his behalf, and alleging that he had himself sold the bricks in question to one Hammond prior to the 5th February; that he had refused to refund the £25 because he had not received it; that he never would have sold similar bricks at 40s. a thousand, which was considerably below the market price, and that McInnes had express instructions not to have any dealings with Fisher, the applicant. An affidavit made by McInnes deposed that the £25 had been employed in paying the wages of respondent's workmen. Other affidavits were filed on both sides which were in direct conflict as to the circumstances of the sale.

Mr. Jones appeared for the respondent.

Mr. Schreiner: McInnes had authority to sell, and sold a particular kiln of bricks which can be identified easily. Applicant suffered the risk of loss after the sale took place, and is entitled now to delivery of these bricks.

Mr. Jones: McInnes had no authority to sell; he was only a manager and his authority to be relied on must be very clear. It is unreasonable to suppose that he had such authority. The contract must be taken as a whole, and it purported to bind the respondent to the delivery of 10,000 bricks a day up to 160,000, in addition to the 40,000 which were in the kiln; there were no others in course of manufacture at the time. Applicant could not sue for specific performance even if McInnes had authority; there has only been a breach of contract. There was no delivery of these bricks; the risk of loss was never on the applicant; he was not bound to these particular bricks; an interdict is a proceeding of a summary nature, and if the right alleged is doubtful it is not fit for an interdict. *Munnik* v. *Heathershaw* (R. 1, p. 86); *Drummond* v. *Allpass* (1879, p. 116).

[De Villiers, C.J., referred to *Lippert* v. *Aris* (Juta 1, p. 187).

We are willing to refund the £25 if it has been used by McInnes on our behalf.

Mr. Schreiner in reply: It was not necessary that there should be any delivery. There has been no tender of the £25.

Postea (March 9th).

De Villiers, C.J.: This is an application for an interdict restraining the respondent from removing a certain kiln of bricks or any part thereof from his premises. The applicant relies upon a document signed by the respondent's bookkeeper, one McInnes, which is in the following terms: "Received from J. Fisher the sum of £25 on account of 200,000 bricks, consisting of blue hards, red hards and seconds, at the rate of 40s. per 1,000 at the kiln; one kiln to be ready on or before Monday, February 14, 1898: the remainder to be ready for removal at the rate of 10,000 per day after the above date." The applicant maintains that included in the 200,000 bricks was a particular kiln, which was pointed out to him by McInnes as the kiln which would be ready on or before the 14th of February. The respondent denies the authority of McInnes to sell the bricks at all, and the evidence is very conflicting as to whether any particular kiln was specified or set apart as forming part of the alleged sale. In this conflict of testimony the safest course is to be guided entirely by the terms of the document itself. That document does not specify any particular kiln as having been sold to the applicant. It is not a case therefore for an interdict but for damages for a breach, if any, of a contract. I must add that I quite concur in the argument of the applicant's counsel that it is not essential to an application for an interdict that the goods sold and proposed to be removed should have been actually delivered to the purchaser; the risk in case of loss or damage falls on him, and although he is not the owner by our law until delivery, he clearly is entitled to the intervention of the Court if the vendor, in breach of his contract, threatens to alienate them. But as no specific bricks were sold in the present case the applicant is not entitled, in the absence of fraud, to restrain the respondent from dealing with his kiln of bricks. In this view of the case the question whether McInnes had authority from the respondent to enter into the contract is not of much importance. I may say this, however, that the evidence by no means satisfies me that McInnes, who occasionally sold ready made bricks for the respondent, had the requisite authority to bind the respondent by a contract for the future delivery of a hundred thousand bricks which had still to be made, and which it would be difficult for him to make within the time fixed by the contract.

The application must be refused with costs.

[Applicant's Attorney, C. C. Silberbauer; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice BUCHANAN.]

MULLER V. MULLER AND ANOTHER. { 1898. Feb. 21st. " 22nd.

This was an action in which G. H. Muller sued for a decree of divorce against his wife on the ground of her adultery with C. F. Engelaar. Damages to the amount of £500 were claimed against Engelaar. There were alleged to have been two acts of adultery, one being committed on October 19, 1897, and the second on October 22, 1897. Both the defendants denied the adultery, and Mrs. Muller put in a claim in reconvention for £200, being the sum which plaintiff had agreed, under an ante-nuptial contract, to pay to the first defendant, and which sum had never been paid. Plaintiff now contended that the sum was to be paid conditionally upon his wife's good behaviour, and that she had by her subsequent misconduct forfeited that money.

Mr. McGregor (with whom was Mr. Close) appeared for the plaintiff; Mr. Buchanan appeared for the first-named defendant. The second-named defendant, who was not represented by counsel, but had filed a plea, appeared in person.

R. D. H. Barry, clerk in charge of the marriage register in the Colonial Office, produced the certificate of the marriage of plaintiff and the first-named defendant.

George Johan Muller, the petitioner, stated that he was a hotelkeeper, living at Sutherland. The defendant was his wife, and the second defendant also resided at Sutherland. He informed witness that he was there collecting debts. Witness was married by ante-nuptial contract to defendant at Sutherland on March 30, 1891. After that they resided in the village until they went to a farm in the country. Afterwards they came back to the village, and he entered upon possession of a hotel there on January 1, 1896. There was one child of the marriage, a boy, who was now dead. At first witness and his wife lived happily together, but afterwards she did not behave herself, and drank a good deal. Witness had frequently found her lying in bed so drunk that she knew nothing. Engelaar had been living with witness as a boarder in the hotel for rather more than a year. He had frequently seen Engelaar and his wife talking together, but took no particular notice of what they said. One night about eleven o'clock he saw Engelaar leave his wife's bedroom and close the door behind him. His wife was in bed at the time, and he asked her what Engelaar was doing there. She said he had been there for a candle. Witness never spoke to Engelaar about that. That was about fifteen days before October 19 last year, when witness went to the Paarl. On October 27, 1897, witness returned from the Paarl, and in consequence of what Jacob van Rooy, a servant in his employ, told him he saw Stadler, his barman. In consequence of what Stadler told witness, he saw Mr. Marais, an attorney in Sutherland, the following day, and since then the present action had been instituted. On the night of October 27 witness slept in the same room as his cousin Abraham Muller, and not in the same bedroom as his wife. Early the following morning his wife came into his bedroom and asked him why he slept there. Witness did not reply to that question, but told her she must go back to her bedroom and sleep there. She then went back to her room. When witness came back from the Paarl his wife was not quite sober. Stadler had been witness's barman for three months, but left in November, and was not now in his employ. Defendant lived for fifteen or sixteen days in the hotel, leaving the morning after she got the summons in the present action. Witness slept in the same room as his cousin for fourteen days after he came back from the Paarl, his wife continuing to sleep in the room downstairs. He never cohabited with her after that. A couple of days before he left for the Paarl he and his wife had a disagreement: but on the day he left she promised to behave herself and take care that there was no further disagreement between them, Up to the time he left for the Paarl witness and defendant were living together as man and wife. She had often abused him and threatened to give him poison. Witness was kind to his wife before he went to the Paarl. He was always good to her. After he returned and refused to sleep any more with her, she had asked his cousin to try and reconcile them. (A plan of the house was put in which witness said was correct.) Witness and defendant became engaged in September, 1890. They decided to be married by ante-nuptial contract the Saturday evening before the marriage, which took place on a Monday. It was on that Saturday evening they talked for the first time about a marriage settlement of £200, and the antenuptial contract was drawn up and signed on the same day that they were married. Engelaar left the hotel on October 28, witness ordering him to quit, and giving him half an hour in which to remove his things. Witness told his boy to take the things out, which he did.

Cross-examined: Witness had lived happily with his wife. He had slapped her a couple of times, when she had driven him to do so. He had never struck her until open wounds appeared on her face. His reason for striking her was that she made too free with people who came to lodge at the hotel, and when she abused him. Witness bought the hotel from Engelaar. Witness had never heard of his wife misconducting herself in that way previous to October 27, and he had never noticed any undue familiarity between her and Engelaar.

Witness had frequently seen his wife talking to young men, and had told her that it was not a proper thing for a young married woman to do. He was not of a jealous disposition. In April last year he had tried to get a separation from his wife, as it was impossible for him to live with her. She refused to separate, and said if he gave her £1,000 she would not leave. Witness was not aware that from October 19 until October 27 his wife had two young girls sleeping with her. He had heard that that was so. Witness first heard of the alleged adultery from his boy. He had a quarrel with the boy, who said something which led him to make further inquiry. The boy would not tell him all, but first referred him to Stadler, who on being pressed told him that his wife and Engelaar had committed adultery, and gave details. Witness did not speak to his wife about it. It was not true that during the last few weeks, up to February 13, he had cohabited with his wife. He had never sent for her to come to the hotel, but he had sent to the house where she went to stay for things which she had belonging to the house, and which he required—a feather bed, a cookery book, &c. She had come to the hotel, but he had never had anything to do with her.

Re-examined: When he slapped his wife she was violent, smacked witness's face, and drove him on the table, and if she had a knife would not have minded stabbing him. When he went to the Paarl it was on money matters. When witness's wife spoke to him on his return about his behaviour to her he told her not to speak to him at all. When she left she took all her own things, as well as some of witness's. Witness was away after that, and she took away some other things, and to get them back he sent a letter of demand through Mr. Marais. Witness had never told his wife not to come to Cape Town to defend herself in that action.

Willem Adriaan Stadler said he was a farmer, but in October he was employed as a barman in Muller's Hotel, at Sutherland. He identified his bedroom, No. 7, on the plan. Mr. Engelaar was staying in the hotel at the time, and witness had frequently seen Mrs. Muller and him talking together affectionately. He saw them on two occasions kissing each other, the first occasion being at the kitchen door. He was in the taproom of the hotel at the time, and saw them through a broken window. The other time he saw the kissing was at Mrs. Muller's bedroom door, before seven o'clock in the morning. Witness was at the time coming out of the smoking-room door. They were standing with their arms round each other's necks. Mrs. Muller never objected to the kissing. It was known in the hotel that Mrs. Muller drank very much. He had also seen Muller drunk many times; in fact he was scarcely ever sober. On the evening of the day Mr. Muller left for the Paarl (October 19) witness had a great quarrel, through his declining to give Mrs. Muller more liquor, because she was too drunk already. He saw Mrs. Muller and Engelaar commit adultery on the night of October 22. He had closed the bar at eleven o'clock, and was in his bedroom when he heard a noise, and looking out saw two people, whom, by their voices and walk, he identified as Engelaar and Mrs. Muller, coming from a gate. They went on the stoep under Mr. Muller's bedroom window, and there committed adultery. It was a bright starlight night, and witness was positive in his statements. He heard Engelaar say "George Muller is far away," but he could not catch Mrs. Muller's reply. Some people were boarding in the hotel, but none of their windows opened on that stoep. The two servant maids did not sleep at the hotel. As far as witness knew Mr. and Mrs. Muller lived well together, but witness had often heard Mrs. Muller speak about her husband, and on one occasion she said he was too bad, but he did not know what she meant to convey by that. She had frequently threatened to take away her husband's life, and not once but twenty times had said that she would poison him. When witness told Mr. Muller about the adultery he was very angry. After Muller came back from the Paarl he and his wife were cooler towards each other, and they never slept together.

Cross-examined: It was not a fact that witness had made advances to Mrs. Muller, and that she had repulsed him. He was very friendly with the servants in the house, but he had never made advances to one of them, Alice de Ville. He had never knocked at the bedroom door at midnight and asked for the keys of the gate. He was certain that No. 7 and not No. 8 was his bedroom. His bedroom was just above Mr. and Mrs. Muller's. On October 22 witness told Jacob van Rooy to remain until the bar was closed in case anyone should want to come into the hotel. Engelaar was a little drunk that night and witness took him up to his room at 8.30. Mrs. Muller was also drunk that night. Witness had not been drinking that night—he did not drink at all. He knew nothing about Engelaar's watch being stolen that night. Witness knew nothing about Alice de Ville sleeping in Mrs. Muller's room. Mrs. Muller was dressed in white when he saw her come in from the gate with Engelaar, but he could not give the specified clothes she was wearing. She was not dressed in white that day. When he looked out of the window he saw a man standing behind the tank near the gate. At that time all the boarders in the hotel were asleep. Witness did not know whether Mrs. Muller knew he had closed up early that night. The second occasion on which he saw Engelaar kiss Mrs. Muller was on October 21.

Re-examined: Witness saw the man behind the tank after he saw Mrs. Muller and Engelaar come in.

By the Chief Justice: Witness could not suggest any reason for the defendant's committing adultery on the stoep instead of in some of the rooms.

Jacob van Rooy, a coloured servant, in the employ of the plaintiff, said he did not sleep at the hotel. He usually left between eight and nine o'clock, except when Mr. Muller was away. Engelaar and Mrs. Muller were very friendly, and on one occasion, when his master was at the Paarl, he saw Engelaar kiss Mrs. Muller in the dining-room. It was in the evening, and witness was in the kitchen. Mrs. Muller did not object. One night he saw Engelaar and Mrs. Muller go together into the latter's room and close the door. Witness did not know how long they stayed there, because he left. So far as he knew there was no other person in the room. Two nights later witness was in the kitchen, and hearing the gate open, went out, and from behind the tank near there saw Engelaar and Mrs. Muller commit adultery. They were at the other side of the tank, underneath Mr. and Mrs. Muller's bedroom window. Mrs. Muller was dressed in white. Witness walked away, and did not see where they went to afterwards. Engelaar was always in liquor, and Mrs. Muller also drank. Witness's master did not sleep in the same bedroom with Mrs. Muller after he returned from the Paarl.

Cross-examined: Betty Theron and Alice de Ville slept in Mrs. Muller's room for four nights when Mr. Muller was away.

Re-examined: Witness did not tell Mr. Muller what he saw the same afternoon the former returned. He told him the following day. Alice van Rooy (or De Ville) was witness's daughter, and was a servant in the hotel.

Hilletje Suzannah Cloete stated that she had lived with her husband opposite plaintiff's hotel for two years, and knew the parties to this action. On the night of Friday, October 22, between ten and eleven o'clock, she was sitting on the stoep with her husband, but he afterwards went inside. Mrs. Muller and Engelaar were sitting on the hotel stoep opposite, and after witness's husband went into the house she saw Mrs. Muller sitting on Engelaar's lap. She overheard a conversation between them, in which Mrs. Muller consented to have immoral intercourse with Engelaar. They then went inside. She did not know whether they were sober. The lights in the hotel were burning, but the bar was closed. Witness had had many conversations with Mrs. Muller about the latter's husband. She said she did not love her husband at all, but loved other men, and that if she got a chance she would take away her husband's life. Mrs. Muller was sober when she said that, but she was in the habit of drinking.

Cross-examined: Witness had never seen Mr. Muller strike his wife. She could see plainly everything that took place on the stoep, and distinctly heard their conversation. Mrs. Muller sat on Engelaar's lap about a quarter of an hour. The conversation which witness had with Mrs. Muller about her husband took place when the latter was away. Witness was friendly to Mr. Muller, and had been friendly with Mrs. Muller previous to the above. Witness had never talked over this matter with Mr. Muller.

Jacob François Cloete, husband of the last witness, corroborated his wife's evidence up to the point when he left the stoep. Witness had several times seen Engelaar and Mrs. Muller drunk. He could not say he noticed any drink on them that evening.

Cross-examined: Witness was friendly towards Mrs. Muller and Engelaar was a close friend of his. He had never mentioned the matter to either of them, as he did not care to interfere. Mr. Muller came to witness and asked if he knew anything, and he told him what he saw and what his wife had told him she heard.

In reply to Mr. Buchanan as to whether he had had some unpleasantness himself over another lady at Sutherland two years ago, witness said he did not think he was bound to answer that question.

Mr. Buchanan asked whether it was not a fact that witness ran away with another woman.

Witness declined to answer that question.

Abraham Johannes Muller, a wine farmer at Groot Drakenstein, cousin of the plaintiff, said on October 22 plaintiff was at his farm, and on October 27 he accompanied him back to Sutherland. When they arrived there Mrs. Muller was not quite right. His cousin greeted his wife kindly and kissed her. That evening later he saw his cousin much excited, and that night they slept in the same room, while Mrs. Muller slept downstairs. During the night she came up to their room to see why plaintiff did not come to his own room, and cursed and swore at him. Plaintiff did not reply, and witness told her to go away, as they were tired and sleepy. She then left. Witness left the hotel on November 10, and while there plaintiff always slept in the same room as witness. While there Mrs. Muller asked witness to try and reconcile her husband and herself, saying she would do better. Witness had heard defendant abusing her husband, saying he was not worthy to live. He had often seen Mrs. Muller and Engelaar in liquor. He heard plaintiff on October 28 order Engelaar to leave the house within half an hour.

This closed the case for plaintiff.

For the defendant.

Aletta Hendrina Muller, the defendant, said that after she and her husband went to the hotel they did not live happily together, as he treated her worse than a coloured person. He struck her on the face, and made open wounds. She did not deny taking to drink, but it was his conduct caused her to do so. She was not always drunk. She had sole management of the internal affairs of the hotel. Stadler did not have room No. 7, he had room No. 8. Her husband often went away on business. In March or April last year he offered witness £250 if she would leave him, saying she was too bad for him, but she wou'd not leave. When her husband was at the Paarl in October, Betty Theron and Alice de Ville slept with her. The one slept on the same bed and the other on a mattress under the window. Witness generally went to bed about nine o'clock. She positively denied that she had ever kissed Engelaar. It was not true that she had sat on Engelaar's knee on the hotel stoep. Mrs. Cloete was not telling the truth. It was not true that Engelaar was in her room on October 19. Betty Theron and Alice de Viile would be in the room at that time. It was not true that she committed adultery with Engelaar on October 22. On that night Jacob van Rooy went home early. It was not true that he stayed until the bar was closed. She closed the kitchen door that night, and went to bed at nine o'clock. She knew nothing about the breaking of the gate until next morning, when a little boy told her about it. Stadler had many a time knocked at witness's door, and made indecent proposals to her, but she would have nothing to do with him. He made the indecent proposals to her in the dining-room, and would come after midnight and ask where the keys of the gate were. When witness's husband returned he never spoke to her about the adultery. She first knew about that when she got the summons. After she left the hotel she stayed in Mr. Hofveld's house. Plaintiff had told her not to come to Cape Town, and after the divorce she could go back and live with him. The £200 due to her under the ante-nuptial contract had never been paid to her.

Cross-examined: Witness received the summons on November 8. When plaintiff asked her not to go to Cape Town, saying that after the divorce she could again live with him, she knew he meant not as his wife. She told her husband after she got the summons about Stadler making indecent proposals to her. She did not tell her husband immediately after he came back from the Paarl. Muller was in such a rage all the time that she could not tell him. When talking with Abraham Muller, at the station, last Saturday, she said Stadler was the man who made the proposal to her, and now tried to blame Engelaar for it, and Stadler had better look out for himself. When she promised to reform if her husband became reconciled to her, she meant she would give up drinking. Last New Year's night she went to a ball at Sutherland, but no gentleman saw her home.

Carl Jacobus Engelaar, the co-defendant, said he was a married man, and resided with his wife at Ceres. He sold the hotel to Muller. After that he stayed on different occasions at the hotel as a boarder, off and on for about a year. He was engaged collecting debts. He absolutely denied that he ever kissed Mrs. Muller, that she sat on his lap on the stoep on October 22, or that he had ever committed adultery with her. He could not exactly recollect all his movements on October 22. He always went to bed at nine o'clock unless he played a game at billiards. It was untrue that Stadler took witness to his room on October 22. Witness went there himself. Witness had been friendly with Mrs. Moller, but not unduly familiar.

Cross-examined: He had known Mrs. Muller from her childhood. He did not know if she drank. Witness sometimes drank more than he ought to. He had never been in Mr. and Mrs. Muller's room, except when the former was there. He had never had long chats with Mrs. Muller. He could not deny having been in Mr. and Mrs. Muller's room about fifteen days before Mr. Muller went to the Paarl. He went there for a piece of candle. He could not say if Mrs. Muller was in bed. He could not remember who gave him the candle. Mr. Muller was either in the room or on the premises. Witness had two small bottles of champagne with a friend on the evening of October 22. He went to bed alone. He could not remember whether he came downstairs again that evening. He was not sober, but he could not say he was drunk.

The Chief Justice asked witness why he did not employ attorneys and counsel and proceed with his case.

Witness said he could not afford it.

Re-examined: When he said he never had long chats with Mrs. Muller he meant that he never put himself out of his way to have long chats with her.

Postea (February) 22nd).

Elsie de Ville (or Van Rooy), a daughter of the witness Jacob van Rooy, said that in October last, when Mr. Muller was away at the Paarl, she slept for four nights with Mrs. Muller, from October 19. Witness was there the night the gate was broken. Witness slept underneath the window in the room overlooking the back stoep. On October 22, witness, Mrs. Muller and Betty Theron went to bed at nine o'clock, and so far as witness knew, Mrs. Muller did not go out again that night. Mrs. Muller could not have been on the front stoep that evening. Witness was a light sleeper, and the bedroom opened with a noise. Mrs. Muller treated Engelaar simply as a boarder. Witness had twice seen Engelaar kiss Mrs. Muller.

By the Chief Justice: That took place when Mr. Muller was away, and happened in the dining-room.

Examination continued: Beyond that witness had never seen any familiarity. Mrs. Muller resisted the kissing, and did not want it. Engelaar only tried to kiss Mrs. Muller, but did not actually do it, as she pushed him away. Witness's duty took her about all the rooms, and she would have seen anything that took place. Witness knew Mr. Stadler.

Defendant's Counsel (to witness): Did he ever make any proposal to you?

Plaintiff's counsel objected to the question.

Defendant's counsel said he had put the question to Stadler.

The Chief Justice: You must take his answer then.

Examination continued: Stadler slept in room No. 8. Witness had to make up his room every morning, and had never found the window in it open. Witness had seen the plaintiff strike the defendant. Witness's father usually went home soon after eight. He did not, so far as witness knew, stay later when the master was away from home. Plaintiff had often sent witness to fetch Mrs. Muller after she had left the hotel and gone to stay at Hofveld's. He just told witness to ask her to come across. He never told witness to ask for the feather-bed, cookery-book, &c. Mrs. Muller always went over when asked.

By the Chief Justice: Witness was living at the hotel after Mr. Muller returned, and she had not since seen Mr. and Mrs. Muller living together.

Cross-examined : Witness left the hotel a month after Mrs. Muller. Witness had seen Engelaar give Mrs. Muller 3s., and Mrs. Muller gave witness 1s. of the money to go and fetch liquor. Engelaar and Mrs. Muller did not talk much together, but she had seen them walking in the garden, when Mrs. Muller plucked a flower and pinned it on Engelaar's coat. With regard to the kissing, on the second occasion Engolaar did kiss Mrs. Muller, and this time she allowed him to do so. Witness had once seen them standing in the pantry, but she did not see Engelaar's arm around Mrs. Muller's neck or waist. On the evening of October 19 Engelaar did not enter Mrs. Muller's bedroom. He came to the bedroom door and asked for Mrs. Muller. Witness told him she was in the back room. Engelaar wanted a candle.

Re-examined: On the second occasion Mrs. Muller allowed Engelaar to kiss her.

Betty Theron, a girl fifteen years of age, living at Sutherland with her father, said that last October, when Mr. Muller was away, she slept with Mrs. Muller at the hotel. They generally went to bed about nine o'clock, Mrs. Muller always going to bed at the same time as witness. She slept five nights with Mrs. Muller, one of the nights being October 22. Mrs. Muller could not have been on the stoep at ten o'clock that evening, as she was in the bedroom at the time. Witness remembered Stadler once coming to the door about midnight to get the key of the gate. Witness had never seen Mrs. Muller go out with Engelaar, and had never noticed any familiarity between them. On the night of October 22, Jacob van Rooy went home early. In December last, witness went with Mrs. Muller to the hotel. Mr. and Mrs. Muller went into the bedroom there, and witness waited in the garden for half an hour for Mrs. Muller. On another occasion, just after Nachtmaal, witness accompanied Mrs. Muller to the hotel. Mrs. Muller and her husband again went into the bedroom, bnt witness did not know how long they remained because she left.

Cross-examined : Witness could not remember what time of day it was when she went to the hotel with Mrs. Muller. It was in the afternoon about four o'clock. The blinds of the room were not down.

Jacobus Ludovicus Theron, Field-cornet, residing at Sutherland, stated that he knew plaintiff and defendant. On October 23 last, when Mr. Muller was away, he saw Van Rooy at the hotel making a row and swearing, and on witness inquiring the cause, he said that it was because somebody had broken the gate, but in answer to a question Van Rooy said he did not know who broke the gate. The distance between the hotel stoep and Mr. Cloete's stoep would be about 22 yards.

G. J. Muller, the plaintiff, recalled and examined by the Chief Justice, affirmed positively that he had never cohabited with his wife since he discovered that she had committed adultery, With regard to Engelaar witness stated that he believed Engelaar was possessed of no means.

After argument.

De Villiers, C.J., said : In this case the plaintiff seems to rely on the evidence of the two witnesses, Stadler and Van Rooyen. The evidence given by these two men was that on the night in question the two defendants were seen to cohabit with each other on the stoep immediately below the window of the room in which Stadler was sleeping. Now, on the face of it, there would appear to be an extreme improbability that these persons, having different rooms in the house that they could use, would select such a place and such a time for the purpose of having this illicit intercourse, and if it were proved that they were in their sound sober senses, the improbability would be so great as to counteract the other circumstances in the evidence for the plaintiff. But unfortunately both the defendants are somewhat addicted to drink, and it is well known that if a person becomes addicted to that, he becomes completely demoralised, and perfectly careless as to what he does, and where he does it. In the early part of the night the co-defendant was so bad that he had to be taken up to his room by the barman Stadler, but it is quite possible that after he had been in his room for an hour or two he may have become sufficiently sober to come downstairs again, and meet Mrs. Muller. There is nothing impossible or improbable in it. Then the evidence of Stadler and Van Rooyen is strongly corroborated by the evidence of Mr. and Mrs. Cloete, who said that on the same evening, about half-past ten, the two defendants were sitting on the hotel stoep together, and Mrs. Cloete heard some conversation between them, which showed that they had some intention of having illicit intercourse. Again, with regard to the improbability of this story there is something to be said to this effect that if these people had set their heads together to invent some story proving the guilt of these people they would certainly have invented something more probable, such as that they had seen the defendants together in a bedroom in which a light was burning, and that they had watched through a window, or something of that kind. But the improbability of the story vanishes when it is borne in mind that the defendants were not in their sober senses on the night in question. We have the further fact that this story is to some extent corroborated by the other evidence before us. Mrs. Muller denies that she ever kissed or allowed the co-defendant to kiss her, but her own witness had stated that on one occasion, at all events, she had seen Engelaar kiss her mistress, and she had allowed him to do so; that on another occasion Engelaar gave Mrs. Muller three shillings, and there are also the incidents of the pantry and the garden when she fastened a flower in his coat. Of course these incidents might be in themselves perfectly innocent, but still they show, to some degree, the reliability of the story. On the other hand, we find that there had been a continued estrangement between husband and wife. I imagine the evidence in this respect to be somewhat exaggerated, and that the defendant did not actually mean to poison her husband, and that those words might have been said in a joke or not meant, but certainly there was an estrangement and there was no longer any love lost between them. But to my mind the worst feature in the case was the evidence given by the lady herself—the cool way in which she told the Court that the young barman had continually solicited her, and yet she had not taken the trouble to tell her husband till later on. I think it showed some looseness in the morals of the woman. Taking all these circumstances together, it is only possible to say that the evidence of these two witnesses as well as the other evidence for the plaintiff is true, and if there has been adultery, the verdict must be for the plaintiff. Then comes the question of condonation. We have that remarkable story that after the summons had been issued against the defendant, and that after she had left the house where the plaintiff lived, he sent for her to come back to him. Of course, strange things do happen; but here we have the strange fact proved that since the plaintiff discovered the adultery he has refused to have anything to do with her. That is corroborated by the plaintiff's cousin, who said that the morning after the plaintiff's return from the Paarl the wife came up to the room where he was sleeping, but plaintiff refused to have anything to do with her. Why then should he, after the issue of the summons, send for her? It seems to me improbable, and I do not think that condonation has been proved. With regard to the damages, I do not think that any damage has been proved. This lady was already addicted to drink, and her husband himself seemed anxious to get rid of her before Engelaar intervened to create this unhappiness between them. It is impossible therefore to say what damage has been sustained; and, moreover, no evidence whatever has been given as to the co-defendant's means; but, at all events, he ought to pay plaintiff's costs.

Mr. McGregor pressed for such damages as would carry costs.

[De Villiers, C.J., suggested £10 as sufficient for that purpose.]

Mr. McGregor said the Court might make an order for all costs, including those between attorney and client.

Mr. Buchanan, on the claim in reconvention:—There was a *donatio inter vivos* before marriage which was merely confirmed by the ante-nuptial contract. That is shown by the wording of the contract.

[De Villiers, C.J.: It has been decided that where a gift has been completed it cannot be upset. But seeing that this gift has not been completed and paid over is it not forfeited by the act of adultery."]

It was not given in consideration of marriage.

[De Villiers, C.J.: Surely, marriage was the only consideration.]

A donation requires no consideration.

The Chief Justice said: Judgment will be for the plaintiff; to be granted a decree of divorce as against the first defendant; as against the second defendant judgment will be for plaintiff for £30 damages and costs. As to the claim in reconvention, it must be dismissed, for the reason that the gift was made in consideration of the marriage, and the gift never having been completed, and being still incompleted, the plaintiff is entitled to a decree of forfeiture of all benefits under the ante-nuptial contract, which includes the defendant's claim for that £200.

Mr. Justice Buchanan concurred.

[Plaintiff's Attorneys, Messrs. Walker & Jacobsohn; Defendant's Attorney, C. C. Silberbauer.]

SUPREME COURT

[Before the Right Hon. SIR J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice BUCHANAN.]

MARNEWICKE'S EXECUTOR V. SOUTH AFRICAN MUTUAL LIFE ASSURANCE SOCIETY. { 1898. Feb. 22nd. „ 23rd.

Life Insurance—Premium—Lapsed policy—Concealment—Declaration of health—Receipt—Agent of Life Insurance Company.

The agent of an Insurance Company received the premium on a life policy from the husband of the insured, more than six months after it fell due in ignorance of the fact that the insured was seriously ill from typhoid fever. The agent informed the husband that the insured would have to come to the office to make a declaration of health, whereupon the husband said that she was sickly, and it was arranged that she would come as soon as she could, and that in the meantime, the money could be retained by the agent as a deposit. The wife died a few days afterwards without making such a declaration.

Held *that the executor of the deceased could not recover the amount of the policy.*

This was an action brought by the husband and executor of the late Mrs. Marnewicke, of Oudtshoorn, for the recovery of £300, the amount of a policy of insurance upon her life issued to her by the defendant company.

The pleadings set out that the policy was issued on the 29th November, 1894, at an annual premium of £5 13s. 3d., payable in half-yearly instalments on the 1st November and 1st May, and that the first two instalments were duly paid, but that the instalment due on the 1st November, 1895, was not paid on that date, nor within the thirty days of grace allowed by the bye-laws of the company. The declaration alleged, however, that on the 18th May, 1896, the company, through their agent, Thorne, at Oudtshoorn, accepted, on behalf of Mrs. Marnewicke, the sum of £3 4s. 2d. for the revival of the policy, being for premiums, fines, and stamps due upon the 1st November, 1895. Mrs. Marnewicke died on the 23rd May, 1896.

The defendants in their plea said that the policy ceased after the expiration of thirty days from the 1st November, 1895, the surrender value being insufficient to meet the amount due in respect of the unpaid instalment, and that notice to that effect was sent to Mrs. Marnewicke; that on the 18th March, when, in fact, Mrs. Marnewicke was suffering from typhoid fever, the plaintiff, her husband, proposed to Thorne, the local agent, to revive the insurance; that Thorne had not authority to do so, but that he informed the plaintiff that if he deposited with him the amount of the unpaid instalment, together with fines, amounting in all to £3 4s. 2d., and produced a declaration signed by Mrs. Marnewicke that she was in as good health as when first examined by the society's medical officer, then the insurance might be revived by the society. That the plaintiff deposited the said sum of £3 4s. 2d. with Thorne, and thereafter informed Thorne that Mrs. Marnewicke was not well, and that Thorne thereupon offered to return the sum deposited, but at the plaintiff's request retained it until Mrs. Marnewicke should be well and able to attend at his office and sign the required declaration. That the required declaration was never signed, and Thorne never paid the said sum to the society, nor forwarded any application for a revival of the insurance to the society, and the insurance never was revived. That Thorne offered to return the sum of £3 4s. 2d. on the death of Mrs. Marnewicke, and is still ready and willing to return it.

A general replication was filed.

Mr. Gardiner applied to have his name substituted as counsel for the plaintiff instead of Mr. Graham, originally appointed by the Court.

The application was granted.

Mr. Schreiner, Q.C., and Mr. Jones appeared for the defendant company.

The 25th bye-law of the society was as follows: " . . . . . any policy issued by the society shall be void, and all moneys which shall have been paid in respect thereof shall be absolutely forfeited to the society, if any premium which ought to be paid to the society in respect of the policy shall be in arrear and unpaid for the space of one calendar month after the same shall become payable."

Bye-law 30 was as follows: "In all cases in which a policy is rendered void, those of fraud excepted, the directors shall have power to revive the same or to make such allowances to those who would otherwise have had an interest therein, as the directors may see fit."

Bye-law 31 was: "TheBoard may authorise any officer or officers of the society to reinstate policies that may have lapsed owing to the non-payment of premiums."

Adam Marnewicke stated that he resided at Kruis Vlei, in the Oudtshoorn district, and that in November, 1894, he took out a policy of insurance on the life of his wife in the South African Mutual Assurance Society. When he paid the first premium Mr. Thorne told him that he could pay the premiums even if they were overdue for a year. He paid the next premium on June 6, 1895. He did not pay that premium to Mr. Thorne, but to Mr. O'Hare, one of the travellers of the company. That receipt was marked temporary, but witness got no other receipt from the company. Mr. Thorne and the travellers said nothing about the premiums being overdue, about the policy having to be revived, or about a declaration of health being required. Witness left Oudtshoorn in October, 1895, and went to Calitzdorp, returning to Oudtshoorn in May, 1896. The next premium on the policy was due on November 1, 1895. Witness had received no request from Thorne to pay up. When witness was away all letters addressed to him at Kruis Vlei were duly forwarded to him, as were all letters for his wife. Witness returned to Oudtshoorn on May 12 or 14, and paid the premium due on the policy on May 18. He did not pay before because he was unable to do so, only having received the money on May 16 (Saturday). Witness met Thorne in the street on May 18, and he called to witness and asked when he was going to pay up the policy on his wife's life, as it was overdue. Witness replied that he was just going to pay it. Thorne told witness that the premium was four months overdue, and he would have to pay a penalty for that. Witness paid the amount of the premium and fines, and received the following receipt signed by Thorne, viz., "Received from Mr. Marnewicke the sum of £3 4s., for revival of policy." Thorne, when he gave that receipt, said nothing about it being necessary to write to Cape Town, and said nothing about just keeping the money for witness until he heard from Cape Town. He asked how witness's wife was getting on, and witness said she was "sickish." Thorne then asked what was wrong with her, and witness said he did not know as the doctor had not told him. At that time witness did not know his wife was dangerously ill. Thorne said nothing about witness's wife having to sign a declaration as to her health, nor did he say that witness would have first to bring his wife before the policy would be revived. Witness saw Thorne a couple of days after his wife's death, and on informing him of that fact Thorne simply said that he would see now that it was a good thing people's lives were insured. Witness afterwards met him on May 26, and he then asked witness for the receipt he had issued, but witness refused to give it up. Thorne then offered to pay back the money, but witness would not accept it. Afterwards witness received a cheque for the amount, which he returned. There was no truth in the statement that witness attempted to defraud the company.

Cross-examined: Witness's wife was in Oudtshoorn when he arrived there on May 12 or 14, having arrived there a couple of days before witness. He could not say if she was ill when she came there. Witness called in Dr. Truter, who attended her until she died. He explicitly denied that Thorne said anything to him about having that declaration. Witness admitted writing to the company asking it to pay a share of the policy, and he would try and get business for the company. Witness wrote that because he was too poor to go against the company. The doctor did not tell witness his wife was ill with typhoid fever until May 20. On May 18 he told witness his wife was very ill, but there was no great danger.

This closed the plaintiff's case.

For the defence,

Stephen Thorne, the local agent at Oudtshoorn of the South African Mutual, gave evidence as to plaintiff taking out a policy on his wife's life after a policy on his own had been declined. The first premium was paid on November 29, 1894. The policy dated from November 1, 1894. A temporary receipt was given by Mr. O'Hare, and witness afterwards issued a further receipt. He explained the system under which the company was worked, and said that he must have issued to plaintiff the receipt put in. As a rule witness issued those receipts personally. He produced the block of the receipt books showing that a receipt to plaintiff had been made out. Notice that the premium was due on November 1, 1896, was sent to plaintiff. Under the system worked plaintiff was bound to receive the usual notices as to the premium being due. Thirty days' grace were allowed. It was not true that witness had never seen plaintiff until he came in to pay him. He had seen him three times since he sent the first notice regarding the premium being due. He saw plaintiff in November, and on speaking to him about the premium he said he did not intend to pay. In April plaintiff admitted that he owed witness 9s., which witness had paid to make up the last premium, and said he would pay that. Witness at that time told him that the policy had lapsed, but that he might make application to have it revived. Plaintiff said emphatically that he had no intention to do more in the matter. On May 18 plaintiff came to witness's office. Witness did not meet plaintiff in the street, but the latter came to witness's office. He asked witness if he could revive the policy, and witness said he could make application for revival, and that the money would have to be tendered and declaration given, and that then it would be for the directors to consider whether the policy should be revived. Witness took up one of the forms and said to plaintiff. "That is what you have to sign." Witness made a calculation, and told the plaintiff that with fines he would have to pay £3 4s. 2d. Plaintiff paid the money, and witness, at plaintiff's request, gave him the receipt produced. Witness had no authority to revive lapsed policies.

[De Villiers, C.J.: Why then, did you not make that appear on the receipt? Why did you not make it clear that it was only a temporary receipt?]

Witness said he looked upon the matter as something between the plaintiff and himself, until he received word from the head office. He just took up the first piece of paper that came to his hand and made out a receipt on it.

Examination continued: Witness never had any authority from the directors to reinstate any policy whatever. Witness acted according to his instructions, and those instructions gave him no power to reinstate. Witness had already told the plaintiff that a declaration would have to be made when the money was paid. Witness then asked plaintiff if his wife was there to sign the declaration. After some pressing, plaintiff said his wife could not come to sign the declaration, as she was ill. Witness then told plaintiff that he had better take the money back and wait until his wife was well again, as nothing could be done until she signed the declaration. Witness had already given the receipt when that conversation took place. Witness did not enter the money he received from plaintiff in the society's book, but made a note of it in his private note-book. When plaintiff informed witness of his wife's death, witness said he was sorry to hear it, and sorry for plaintiff's sake that he had not revived the policy.

Cross-examined: With regard to payment of one of the premiums being accepted on June 6, 1895, over thirty days overdue, witness could not remember whether in the case a declaration had been made. The money in the case was collected by O'Hare. Some declaration must have been made with regard to the case.

Plaintiff's counsel said he would call for the correspondence.

Cross-examination continued: Witness did not remember making any inquiries on June 6 with regard to the health of plaintiff's wife.

William Marshall, secretary to the South African Mutual Society, gave evidence as to the system of the society with regard to the issuing of receipts for payment of premiums, and also for the sending of notices to holders of policies the premiums on which were due or overdue. No application for the revival of the policy held by plaintiff's wife had been received by witness from Mr. Thorne. Witness was authorised by the directors of the company to reinstate policies, but neither Mr. Thorne nor any country agents were authorised to reinstate (or revive) policies. With regard to the acceptance of a premium on the policy on one occasion when over thirty days overdue, witness explained that the policy had only lapsed for a few days, and as very probably Mr. O'Hare, the company's traveller, who received the money, had seen the plaintiff's wife, and had written to the effect that she was in good health, they would not trouble about a declaration.

Dr. R. M. Truter, in practice at Oudtshoorn, stated that on May 13, 1896, he was called in to attend plaintiff's wife. He treated her at first for influenza, but two days later he discovered that she was suffering from typhoid fever. She died on May 23 from typhoid fever and heart failure.

Witness was certain that on May 15 he told plaintiff that his wife was as bad as she could be with typhoid fever.

Edward O'Connell, formerly a clerk with Mr. Thorne, gave evidence as to the plaintiff coming to Mr.Thorne's office on May 18, 1896. Mr. Thorne was in the office, and plaintiff walked in, so he could not have met Mr. Thorne in the street. Witness overheard Mr. Thorne saying to plaintiff that he could do nothing until he had the form of declaration signed.

Mr. Gardiner: Thorne knew that Mrs. Marnewicke was ill and showed negligence in not making proper inquiries: the receipt he gave purported to be a clean receipt. The argument that there was no revival is of no value in the face of the fact that the premium due on the 1st May, 1895, was paid after the days of grace had expired and there is no evidence that a declaration of health was made or that the directors were communicated with. The bye-laws do not require the written authority of the directors in order to revive a policy. The authority of an agent may be implied from a previous waiver of a former forfeiture of of the same policy. *Cohen* v. *Continental Life Assurance Co.* (60 American Reports, p. 24). Here there was a previous waiver of the necessity of obtaining the directors' authority. Neither the bye-laws nor the policy requires a declaration as to health to be made. *Smith* v. *Hull Plate Glass Insurance Co.* (11 C.B., p. 897); *May's Law of Insurance* (Vol. I., p. 136); *Wing* v. *Harvey* (5 De G.M. & G., p. 265); Judgment of Knight-Bruce, L.J.; *Murphy* v. *Southern Life Insurance Co.* (27 American Reports, p. 761).

[De Villiers, C.J.: What is there here to show a waiver?]

The giving of the receipt by Thorne.

[De Villiers, C.J.: The receipts which were sent to you state that all receipts must be on the company's printed forms.]

We say that we never received any of those receipts.

The contract must be construed against the company. *Cornelinssen* v. *Equitable Fire Insurance Co.* (4 Searle, p. 365).

De Villiers, C.J.: Mr. Gardiner has argued the case very well and has collected the authorities bearing upon it with great industry, but the plaintiff's case is really hopeless. One of the bye-laws of the defendant company provides that "any policy issued by the society shall be void, and all moneys which have been paid in respect thereof shall be absolutely forfeited to the society, if any premium which ought to be paid shall be in arrear for one month." Another bye-law enables the Board of the company to revive a policy which has been rendered void, and to authorise any officer of the society to reinstate policies that may have lapsed owing to the non-payment of premiums. The premium due in respect of the policy for the amount of which the plaintiff now sues as his wife's executor became payable on 1st November, 1895. Neither the plaintiff nor his wife had the means to pay, and I believe the statement of Mr. Thorne, the company's agent at Oudtshoorn, that he was told by the plaintiff at the end of 1895 that the policy would not be revived. On the 18th May, 1896, the plaintiff called at the agent's office and offered to pay the half-yearly premium due in November, 1895. The agent accepted the money and gave a receipt for it, but not upon one of the company's forms. The agent then informed plaintiff that his wife would have to come to make a declaration of health, and then only the plaintiff informed the agent that she was "sickly." It was arranged accordingly that she should come and make her declaration as soon as she could, and that in the meantime the money should be retained as a deposit. In point of fact the wife was seriously ill at the time from typhoid fever, and the plaintiff had been informed of this fact by the doctor attending her. I am satisfied that nothing took place between the plaintiff and the agent, from which it can be inferred that the agent intended to reinstate the policy or waive the forfeiture. It is unnecessary therefore to decide whether the agent had any authority from the company to do the one thing or the other. The agent received the premium more than six months after it fell due, without any knowledge of the material fact that the insured was very seriously ill, and he retained the money merely as a deposit until the company should decide whether the policy was to be reinstated or not. The wife never made the declaration of health, and in fact she died a few days after the money was paid. Under these circumstances it is impossible to hold that the wife's executor can recover the amount of the policy, and the judgment of the Court must be for the defendant with costs.

Buchanan, J., concurred.

[Plaintiff's Attorney, P. M. Brink; Defendant's Attorneys, Messrs. J. & H. Reid & Nephew.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and Hon. Mr. Justice BUCHANAN.]

BRILLIANT SYNDICATE V. THE NEW ELANDSDRIFT MINING AND ESTATE COMPANY AND THE COLONIAL GOVERNMENT.

1898. Feb. 23rd.

Mr. Schreiner applied on behalf of the appellants (the Brilliant Syndicate) for authority to the Registrar to set down this case, an appeal from the judgment of the High Court of Griqualand West, for hearing on February 28. He explained that it had been impossible to give the requisite ten days' notice, owing to the records being in the hands of the printers.

The Court ordered that the case be set down for hearing on March 8, the Chief Justice remarking that he hoped by that time Mr. Justice Maasdorp would be sufficiently well to take part in the case.

The question of costs of this application was allowed to stand over.

FRANCISCUS V. FRANCISCUS.

Divorce—Custody of children.

This was an action for divorce on the ground of adultery.

Mr. Buchanan for the plaintiff ; Mr. Close for the defendant.

Christina Elizabeth Franciscus, the plaintiff, stated that she was married to defendant in community of property on November 13, 1883. Neither plaintiff nor defendant had any property when first married. They lived happily together until about four years ago, when defendant became attached to a Malay woman, named Rosina. There were four children of the marriage alive, the eldest a girl aged thirteen and the youngest a boy aged nine months. Plaintiff had now custody of the youngest child. After defendant took up with the Malay woman he began to ill-treat the plaintiff. On November 15 last defendant beat her severely, and she had to leave the house. When she returned her husband was out, but had left a message with the children to the effect that if she came back he would twist her neck as he would twist the neck of a fowl. Thereupon witness again left, taking the youngest child with her. She had not since lived with plaintiff, and the following day the Malay woman went to the house, and had since resided there. Rosina had previously been married to a Malay man, by whom she had two children living. Rosina had had two children by defendant. Witness was not of intemperate habits. She only wanted defendant to contribute to the support of the children, and would support herself. Defendant was out at work all day, so that the children were under the control of the Malay woman. Defendant had only contributed £1 10s. to the support of plaintiff and her child since she left his house.

Cross-examined : Witness had taken a glass when her husband fetched liquor to the house, but she was never drunk,

William Shenton, a warehouseman, who had been a neighbour of plaintiff and defendant until six months ago, said he had never seen the plaintiff drunk, and she appeared to take good care of the children.

Roos, formerly a cabdriver in the employ of the defendant, gave evidence as to the row between plaintiff and defendant on November 15. So far as witness knew the plaintiff was kind to the children, and he had never seen her drunk. Defendant also treated the children well.

Rosina stated that she had lived with defendant as his wife. She had had two children by him.

This closed the case for the plaintiff.

For the defence,

Moses Franciscus, the defendant, stated that he and his wife lived happily, with one exception a year after marriage, until four years ago. They then had quarrels. The quarrel last November arose through plaintiff taking £8 of defendant's. Defendant treated plaintiff well, but she drank a great deal and then she got perverse. Witness always had to complain about her neglect of the children.

Cross-examined : Witness had told Rosina to go, but she had not yet done so.

James Ross Mitchell, manager of Mr. McKenzie's brickfield, gave evidence as to the good character of defendant, who worked under witness.

Lena, a coloured girl apparently aged about thirteen, stated that she had been a servant in the employ of plaintiff and defendant. Plaintiff was always drunk.

Cross-examined : Plaintiff was drunk afternoon and evening, and sometimes in the morning.

Jacobs, Franciscus's stable-boy, stated that he had often seen plaintiff drunk. She sent witness for drink—wine, sherry, hock, and brandy.

Cross-examined : Plaintiff was often too drunk to attend to the master's food, and Lena had to do so. Defendant was a hasty-tempered man, but soon got all right again.

After argument by counsel as to the custody of the children,

The Chief Justice said : In this case the adultery is proved, and there must therefore be a decree of divorce, with costs. Then there is the question of the division of the joint estate, Mr. Currey will be appointed receiver for the purpose of dividing the property. Of course either of the parties may make a proposal to him which will obviate selling the properties, and he can submit the scheme to the Court. With regard to the custody of the children, that is more difficult to decide. I fear that if the mother gets the £200 or so from her share of the property, she may give way to drink. I think it much better that these children should live with the father and the other woman, rather than with a mother who is addicted to drink, and that it would be better to leave the children as they are—the eldest three with the father and the youngest with the mother, with leave reserved to both sides to apply again for the custody of the children. There will also be an order to both parties for access at all reasonable times. There is only one point remaining, and that is the question of maintenance. The mother will have custody of the youngest child, and as she gets half the joint estate, I do not think there should be any special order as to maintenance, because defendant will have to maintain three children. Leave will be given plaintiff to apply again in the matter. The judgment of the Court will therefore be : decree of divorce with costs ; an order for the division of the property in the joint estate, Mr. Currey to be appointed receiver ; plaintiff to have custody of the youngest child, and defendant custody of the other three, each to have access at all reasonable times, with leave to either party to apply again, and plaintiff to have leave to apply again with reference to the maintenance of the child in her custody.

Mr. Justice Buchanan concurred.

[Plaintiff's Attorney, G. Ayliff; Defendant's Attorney, A. Steer.]

KAMA AND OTHERS V. COLONIAL GOVERNMENT.

1898.
Feb. 23rd.
" 24th.
" 25th.
" 28th.

Governor's commission—Grant of land—Public seal—Crown land—Native locations—Trading stations—Privity of contract.

By a document executed in 1861 by the then Governor under his hand, but not under the public seal of British Kaffraria, a tract of land was "given over" to the Chief Kama, his family and tribe, for their occupation and use under such regulations, fiscal or otherwise, as might from time to time be fixed by the Government, and on condition that they should perform certain services for the Government. The Governor's commission authorised him to issue grants of land in British Kaffraria but only under the public seal of that territory.

Held, *that the document could not operate as a grant of the land, and that the land remained Crown land subject to the right of occupation of the present Chief, his family and tribe.*

Held, further, *that the present Chief and his tribe, having always performed the conditions upon which the Governor "gave over" the land, and having ratified the stipulation made on their behalf, are entitled to a declaration of their rights as against the Government.*

Held, further, *that the Government is bound by the Governor's promise except in so far as the Legislature may have passed any enactments which are inconsistent with the fulfilment of such a promise.*

Held, *that Acts dealing expressly with native locations on Crown land, including Act 40 of 1879,* *Act 37 of 1884, Act 28 of 1888 and Act 33 of 1892, apply to native locations within the tract in question.*

Held, further, *that the Government has no right, without the concurrence of both Houses of Parliament, to grant or lease trading stations within the tract or to issue titles to land therein under Act 37 of 1882 and a declaration made accordingly.*

The case of Tradesmen's Benefit Society *v.* Du Preez *(5 Juta, 269) approved and applied.*

This was an action for a declaration of rights, for damages, and for an account instituted by Kama, Chief of the Amagqumkwebe tribe, against the Colonial Government.

The declaration was as follows:

1. The plaintiffs are William Shaw Kama, Chief of the Amagqumkwebe tribe, Lutule Kama, Ngangelizwe Kama, Lunango Kama, Siduna Kama, George Kama, sons of the late Chief Kama, and James Moma, Kulile, Job Sinxo, Mentu Hashe, Gana Kaba, Gelani Dema, Maclean Saki, Philip Dyunga, Hale Nyinata, William Mtshozeni, Joseph Mfenge, Lamani Hashe, Petros Mayipasi, Dwashu Sityi, Ncapayi Dwanya, Klaas Mfundisi, Tame Xabane, Isaiah Gweleta, Meshach Hashe, Timothy Bewzana, September Ngxale, Jali Qomfu, Ngeku, Makinana, Nakupi, Jeremiah Hina, Kundulu, Besti, Mtentu, Solomon Dlakiya, Koyana, Nono, Sinam, Mtseu, Lobishe, Busakwe Nomi, and Cizelana, and members of the said tribe. The plaintiffs all reside at Middledrift, in the division of King William's Town, and sue in this action individually and for and on behalf of the members of the said tribe, being duly authorised so to do by resolution passed at a general meeting of the said tribe held at Middledrift on or about May 25, 1896.

2. The defendant is Sir John Gordon Sprigg, K.C.M.G., who is sued in his capacity as Treasurer and Prime Minister of the Cape Colony, and as such representing the Colonial Government.

3. On or about February 7, 1861, Sir George Grey, then Governor of the Cape Colony and of the territory then known as British Kaffraria, and Her Majesty's High Commissioner for South Africa, gave and granted upon certain conditions to the Chief Kama, his family and his tribe a certain tract of country described and defined in a sketch or diagram attached to the said grant; a copy of the said grant is hereunto annexed, marked "A," and the plaintiffs pray that it may be considered as herein inserted.

4. The said Chief Kama was at the date aforementioned the Chief of the said Amagqumkwebe tribe, and the plaintiff, William Shaw Kama, is his son and successor as chief; certain of the plaintiffs represent the family of the said Kama, and the plaintiffs in this action represent the grantees under the said grant.

5. The said tract of country was at the aforementioned date portion of the Crown Colony of British Kaffraria, which was in or about 1865, under and by virtue of Act 3 of 1865, annexed to and now forms portion of this colony.

6. Prior to the date of the said grant—to wit, from the year 1854 or thereabouts—the said Chief Kama, his family, and his tribe had occupied and used the land granted as aforesaid, and from and after 1861 they and their successors and representatives now represented by the plaintiffs have continued to use and occupy it as their property, subject only to the user and occupation hereinafter referred to of portions of the said land by other persons.

7. After the year 1861 the Colonial Government from time to time wrongfully and in violation of the terms of the said grant, interfered with the rights of the Chief Kama, his family, and tribe, and thereafter with the rights of the plaintiffs as representing the said grantees, and prevented the said chief and his tribe and thereafter the plaintiffs from enjoying and exercising the free and undisturbed use and occupation of the said land within the true intent and meaning of the said grant, and the said Government claims the right further to interfere with the plaintiffs' rights, their use and occupation, and has taken steps so to do; the said acts and claims are hereinafter set forth and described.

8. From time to time thereafter the Colonial Government wrongfully issued grants of portions of land within the limits of the area included within the said grant "A" to individuals, who took possession of and occupied the portions of land so granted; the plaintiffs and their predecessors including the said Chief Kama repeatedly protested

against the issue of the said grants and the occupation of any of the said land by the said grantees.

9. The said Government has taken steps to cause certain lots at a place styled Knapp's Hope within the limits of the said grant, and also an area of ground as commonage adjacent to the said lots, to be surveyed in order that titles may be issued to individuals granting to them the said lots and certain rights of servitude over the said commonage.

10. The said Government has taken steps to demarcate certain land within the limits of the said grant as commonage appurtenant to certain villages of Annshaw and Penline which have been established by Government therein, by the grant of individual titles to lands situate on the said localities; the plaintiffs and members of the said tribe protested against the acts of the Government, and they contended and now contend that the issue of the said titles is wrongful and in contravention of the grant "A" issued to them

11. Certain military rayons or lines had been demarcated prior to the year 1861, and thereafter existed round forts styled Middledrift and Fort White, which forts are within the limits of the said grant; the said Government has wrongfully, illegally, and forcibly entered upon the said land included within the said "rayons," has sold and disposed of a large portion of the same, and has granted titles of portions thereof to individuals in spite of the protests of the members of the said tribe and of the plaintiffs, and has exercised the right of dealing with, and claims the right to deal with the whole of the land within the said rayons as the absolute property of the Colonial Government, and as not included within the terms of the said grant.

12. From time to time after the year 1861 the said Government wrongfully and unlawfully issued permits to divers persons authorising them to trade and establish shops upon land within the limits of the said grant, and let to the said persons portions of the said land as sites for the said shops, to the exclusion of the members of the said tribe and the plaintiffs. The said Government has from time to time received moneys in respect of the said permits and leases, and refuses to account to the plaintiffs for the same or to acknowledge that the plaintiffs have any claim thereto.

13. The said Government claims that the whole of the said land is Crown land within the meaning of Act 40 of 1879, Act 37 of 1884, Act 28 of 1888, and Act 33 of 1892, and is taking steps to levy a hut tax upon all the plaintiffs who are occupants of huts within the limits of the said grant, under the provision of Act 33 of 1892, and to demarcate portions of land therein as native locations subject to the provisions of the said Acts, and to locate members of the tribe upon the said locations.

14. By reason of the wrongful and illegal acts of the Colonial Government as set forth in sections 7, 8, 9, 10, and 11 of this declaration, the plaintiffs have sustained damages in the sum of £20,000.

Wherefore the plaintiffs claim:

I. An order declaring: (*a*) That the land referred to in the said grant has been inalienably given over to the said tribe, and is no longer vested in the Colonial Government. (*b*) That the Colonial Government is not entitled to interfere or deal with the said land otherwise than as may be authorised by the terms of the said grant. (*c*) That Acts of Parliament dealing with Crown land, and especially the following Acts in so far as the same refer to Crown land, have no application to the said land, or to the plaintiffs or other members of the said tribe by virtue of their ownership or occupation thereof: (i) Act No. 40 of 1879; (ii) Act No. 37 of 1884; (iii) Act No. 28 of 1888; (iv) Act No. 33 of 1892.

II. An interdict restraining the said Government from causing any lots of ground or commonage at Knapp's Hope to be surveyed or from granting any titles thereto.

III. A declaration that the Colonial Government has no power to demarcate any commonage at Annshaw and Penline within the limits of the said grant, and an interdict restraining the said Government from granting any titles or framing any regulations in respect of such alleged commonages in derogation of the rights of the plaintiff.

IV. Payment of the sum of £20,000 as and for damages sustained by the plaintiffs and by the said tribe through the said Government having wrongfully, illegally, and forcibly entered upon certain of the land granted as aforesaid within the rayons or lines of Fort White and Middledrift, and having sold and disposed of the same.

V. That the said Government be ordered to render an account, showing the moneys received in respect of the permits for th said shops and leases of the land assigned as sites for the same, and to pay over the amount thereof to the plaintiffs.

VI. Such further or other relief as may be meet.

VII. Costs of suit.

The Government filed the following plea:

1. As to paragraph 1 of the declaration, the defendant admits that the plaintiffs reside at Middledrift; that William Shaw Kama is recognised as the personal chief or headman of the Amagqumkwebe tribe of natives, and that, of the other plaintiffs, some are members of the said tribe.

2. He does not admit the other allegations in the said paragraph, and he specially denies that the resolution therein referred to, if passed as alleged, did, or in law could, authorise the plaintiffs to have and maintain this action for and on behalf of the members of the said tribe.

3. The defendant admits paragraph 2 of the declaration.

4. In or about the year 1854 a tract of land in British Kaffraria, then a Crown Colony, was reserved for the purposes of the Amagqumkwebe tribe of natives, of which tribe a certain Chief Kama, a subject of Her Majesty the Queen, was then, and afterwards until his death, recognised as the personal chief or headman.

5. Thereafter in January, 1861, certain portions of the said tract of land were duly surveyed, and granted in due form of law to the said Kama and to certain other members of his family or tribe; and on the 7th February, 1861, His Excellency Sir George Grey, then Governor and High Commissioner, and as such representing Her Majesty the Queen as Governor of the said Crown Colony, confirmed to the said Kama, his family, and tribe, the reservation of the remainder of the said tract of land, save and except certain portions which were included within the rayons hereinafter referred to, and which formed military reserves, and signed the document (copy whereof is annexed to the declaration) by which the use and occupation of so much of the said tract of land as had not been granted as aforesaid and was not included in the military reserves, was reserved for and given to the said Kama, his family, and tribe.

6. The said tract was not surveyed nor any diagram thereof framed; but a sketch was attached to the said document, depicting its extent and showing the rayons within which the said military reserves were situated.

7. The said document was not, and does not purport to be a grant, as alleged in the declaration; nor was it executed as a grant of land in due form of the law at that time in force in the said Crown Colony; nor was it then, or at any time, registered as a grant of all or any of the land so depicted on the aforesaid sketch; but only confirmed the reservation of certain land for the purposes of the said tribe as set forth in paragraph 5 hereof.

8. The tract of land so reserved was, and continued to be before the annexation of British Kaffraria in 1865 to the Cape Colony, Crown land vested in Her Majesty the Queen, subject to the aforesaid reservation, and subject to such laws and to such fiscal or other regulations as were in force in the Crown Colony of British Kaffraria relative to land reserved for the purposes of native communities and tribes.

9. Upon such annexation as aforesaid the said land became, and is, Crown land within this colony, vested in Her Majesty the Queen in Her Colonial Government, subject to such reservation as aforesaid, and subject to such laws and to such fiscal or other regulations as now are, or have from time to time been, in force in this colony relative to land reserved for the purposes of native communities and tribes, and more especially subject to the Acts No. 2 of 1869, No. 10 of 1870, No. 6 of 1876, and No. 8 of 1878, until the repeal of the said laws, and now subject to the operation of Acts No. 40 of 1879, No. 37 of 1884, No 28 of 1888, No. 33 of 1892, and generally of all laws regulating native locations upon Crown lands; and the natives residing on the said land have, until recently, at all times paid—as they were in law bound to do—the hut tax due under the law in force for the time being, and imposing that fiscal burden.

10. The Military Reserves included within the aforesaid rayons were not in 1861 reserved for the purposes of the said tribe; and the land so included was, both before and since annexation, lawfully dealt with by the Government for the time being in accordance with the laws regulating the disposal of Crown land, and many grants both before and since annexation, have been made of portions of the said military reserves for military stations, for Lovedale Institution, for agricultural immigrants, and for other purposes, but the plaintiffs have thereby sustained no grievance.

11. As to the mission-stations of Annshaw and Peuline and the commonages appurtenant thereto, the defendant specially says that the grants of allotments of land to inhabitants individually, and of commonages

for the use of the inhabitants of those mission-stations, were lawfully effected many years ago, and were moreover specially approved of by the late Chief Kama and his agent and representative, the late Rev. William Impey.

12. The mission-station of Knapp's Hope was in existence before 1854, and has continued in occupation of its inhabitants since that time; and before the 7th February, 1861, the instructions had already been issued for the survey of lots to be granted to individuals, and of commonage adjacent thereto for the use of the said inhabitants; and the defendant admits the allegations in paragraph 9 of the declaration, and says that the steps taken by the Government, and referred to in that paragraph and in paragraph 10 of the declaration, have at all times been in accordance with law.

13. The inhabitants of the aforesaid three mission-stations have been, and are, for the most part members of the aforesaid tribe, and their rights by grant and long user of thirty years and upwards are materially affected by the claims made by the present plaintiffs.

14. The Government has from time to time lawfully permitted certain persons to trade and to establish shops at suitable spots, and has allowed certain trading-stations suited to the requirements of the locality to be established on portions of land lawfully let by the Government, and moneys have from time to time been lawfully received by the Government in respect of such permits and leases, and lawfully refuses to account to the plaintiffs for such moneys or to acknowledge that the plaintiffs have any claim thereto.

15. Save as aforesaid, the defendant denies the allegations in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 of the declaration.

Wherefore he prays that the plaintiffs' claim may be dismissed with costs.

To the above plea the plaintiffs filed the following replication:

For a replication to defendant's plea plaintiffs say:

1. As to paragraph 5 thereof they admit that separate titles to certain land within the boundaries indicated on the diagram attached to the grant, copy whereof is annexed to the declaration, were specifically given to certain three sons of the said Kama.

2. As to paragraph 6, they admit that the land referred to was not surveyed, and that no deed is registered in the Deeds Office in respect of the grant set forth in the declaration.

3. As to paragraph 9, they admit that natives residing on the said land have from time to time paid hut tax; they deny that they were bound in law so to do, and they specially deny that the laws in the said paragraph mentioned as formerly in force, were put in force or were applicable to the land within the limits of the said grant, or that the laws now alleged to be in force within the said grant are applicable or in force in regard thereto.

4. As to paragraph 11, they admit that the said mission-stations were surveyed, and title granted to individual occupiers, and that this was done with the consent of the said Kama, but they deny that the consent of the said Kama was ever given to the survey of any commonage for the said stations, or that any commonage has been exclusively used in the past by, or can lawfully be reserved for the exclusive use of the inhabitants of the said stations.

5. As to paragraph 12, they admit that prior to 1850 there was a mission-station in existence at Knapp's Hope before the said Kama came into possession of the said land; in or about 1850 the inhabitants of the said mission-station left and abandoned it on account of the war then prevailing. Thereafter, after the said land had been granted to the said Kama as aforesaid, the said inhabitants were allowed to return to and occupy the said station, with the express permission of the said Kama, but not to occupy the said ground as of right, but under sufferance.

6. As to paragraph 13, they admit that certain inhabitants of the said mission-station are members of the said tribe.

7. Save as aforesaid, and save in so far as any of the allegations in the declaration are admitted in the plea, they deny all and singular the allegations of fact and conclusions of law in the said plea contained, and join issue thereupon, and again pray for judgment, with costs of suit.

The rejoinder was general, and upon these pleadings issue was joined.

The document (Annexure "A") relied upon by the plaintiffs was in the following terms: The tract of country described and shown in the annexed sketch has been given over to the Chief Kama, his family and his tribe, for their occupation and use under such regulations, fiscal or otherwise, as may from time to time be fixed by the

Government, and under the conditions that at all times and under all circumstances they are to protect the road from King William's Town to Fort Hare, to answer for its security from any Kafir molestation,and to detect and apprehend all thieves passing through their country. The Government reserves to itself the right of resuming all lands required for military posts or public works. Given under my hand at King William's Town this seventh day of February, 1861.—(Signed) G. GREY, Governor and High Commissioner.

Mr. Rose-Innes, Q.C., and Mr. Searle, Q.C., appeared for the plaintiffs.

Mr. Schreiner, Q.C., Mr. Sheil, and Mr. Bisset for the Government.

William Mama, a member of the Amagqumkwebe (Kama's) tribe, stated that in May last a large meeting was held at Middledrift to discuss the matter in dispute in this case. The meeting was called two weeks previously by messengers sent out. The chairman of the meeting was witness's father, and witness acted as secretary. A resolution authorising the Chief to institute the present action was carried unanimously.

Cross-examined: All the names in the resolution were Kama's councillors. They were all present, including Solomon Dlakiya. William Shaw Kama was reckoned as a councillor. Solomon Dlakiya made the mark on the power of attorney, although witness did not see him doing so. There was a large attendance, but witness could not give the exact number of those at the meeting. Witness knew there were thirty locations in Kama's country, each with its own headman. Witness knew all the headmen. All the headmen were present, except Joseph Tele, the headman of Annshaw. The English Church had a mission near Knapp's Hope. Witness's father was a headman in the time of old Chief Kama, and received salary from the Government. Witness did not know if William Shaw Kama received his salary from the Government on the same scale as witness's father had.

William Shaw Kama, chief of the Amagqumkwebe tribe, stated that he was a son of the old Chief Kama, who was brought down from Kamastone to Middledrift. Witness's father had helped the English troops in the 1850 war, and Sir George Cathcart brought him and his people down to Middledrift, and said they could settle there. When they came to Middledrift there were no people in the country. There were neither people nor houses at Knapp's Hope. The houses had been burned down and the missionary, old Mr. Keyser, and all the people had left. After witness came down to Middledrift he remembered Sir George Cathcart coming there, and witness's father spoke to him about the ground, and asked him for a title to the ground. Witness was present. Sir George Cathcart said he would give a title. Afterwards Sir George Grey came, and saw witness's father twice at Middledrift. Witness's father spoke to him twice on the same subject, and Sir George Grey said he must go to King William's Town, and he would get a title for the land. Witness, Gana, and Joseph Tele accompanied witness's father to King William's Town. That was some years after they had settled at Middledrift. At that time there were soldiers there. When they went to King William's Town witness's father got the document (produced) from Sir George Grey after waiting several days. After witness's father got that document the troops at Middledrift and Fort White remained a short time. Witness could not say how long. After the troops left some of witness's tribe built huts and ploughed inside the military rayons, but were driven off by the Magistrate. Witness's father went to see the Magistrate at King William's Town, and complained about the matter. Gana went with him. When Mr. Keyser and the people with him returned to Knapp's Hope they asked the permission of witness's father to settle there. Mr. Keyser's people were of a different tribe. There had been no title issued to Knapp's Hope yet, but witness remembered surveyors coming there many years ago, and putting up flags. Witness's father complained about the survey, and it was stopped, and had never been surveyed since. The people living at Knapp's Hope witness considered as his people, but there were many newcomers from different parts. Many had come there lately. Witness knew the boundaries proposed to be given to Knapp's Hope commonage. If that commonage were put aside for the Knapp's Hope people it would interfere with other people very much, there being now several villages on the commonage, and the boundaries would pass through some of these villages. Many years ago witness's father agreed to building and garden lots being surveyed at Annshaw. Nothing was then said about a commonage there. There were now people living on the commonage demarcated at Annshaw. Witness had never consented to a commonage at Annshaw. He objected because people living there would lose their rights. Peuline was surveyed at the same time as Annshaw. Witness objected to a commonage there for the same reasons as he objected to the Annshaw commonage. There were people on the Peuline commonage also. There were four leases for shops which the Government had given on this ground. These people did not pay rents to witness. There were five people in witness's territory who paid him rent.

Cross-examined : Witness did not know anything about a letter sent by the missionary in 1874, in which he stated Sir George Cathcart had given his (the missionary's) late father permission to return to their station at Knapp's Hope, and that Kama came there after they were there,and had been informed by the Governor that they had permission to settle there. The people at Knapp's Hope mostly belonged to the Gaika tribe, while witness's tribe belonged to the Gcaleka tribe. Witness was unaware of a document his father had signed on April 25, 1855, in which he gave to the people residing at Knapp's Hope Mission-station the land on the east bank of the Keiskama as a mission-station, the main condition being that the land should not be brought under cultivation. Witness had never seen Mr. Impey write a letter for his (witness's) father. Witness believed his father's name might have been used for the purpose of getting the survey, but witness's father was against any survey. Witness knew Mr. Holden, who was missionary after Mr. Impey. Mr. Holden, in 1874, when witness's father was getting old, made representations to the Government which resulted in witness being appointed chief. Mr. Holden might have written letters on behalf of witness and witness's father. Witness knew Mr. Innes and Mr. Abercrombie Smith. In 1874 they came to Middledrift. At the time witness's father had objected to Knapp's Hope Commonage. Witness acted for his father, the latter being sick. Knapp's Hope titles were not issued, but the people remained there. Witness knew in 1874 Mr. Murray was surveying, but witness never went to Mr. Murray and objected to his putting in beacons. He did not object because objection had been made at a previous meeting, when Mr. Bright was the surveyor. Witness knew Mr. Van Renen, who surveyed the Peuline commonage. When he was doing so witness pointed out the beacons of his private farm, which adjoined the commonage. Witness could not say where the Knapp's Hope people grazed their cattle, but he objected to their having a commonage.

Kama, further cross-examined, said that they got titles from Sir George Grey to the farms mentioned. Those farms might have been surveyed by Mr. Cooper. Witness knew Mr. Simpson. Witness never objected to Mr. Simpson occupying a certain piece of land. Simpson was there before witness's time. Witness had garden lots at Annshaw, upon which he had always paid quitrent. Witness drew a salary of £7 per month, and an additional £20 every four months from the Government. Witness did not know what he got the £7 per month for. He got just the same as his father had received before him. The £20 portion was for services his father had rendered in wartime. Witness knew Mr. King and Mr. Verity, who had been Magistrates in the district. When newcomers came the Magistrate did not consult with witness as to where they should be placed. Mr. King and Mr. Verity did consult with witness on such matters. Witness contended that the land in his territory held by the Lovedale Seminary had been wrongly given. It was given many years ago. Witness's father was strongly in favour of that institution. Witness was not aware that the old Government of Kaffraria gave the land to the Lovedale Seminary after witness's father got the papers from Sir George Grey. Witness could not tell the exact place where the seal was attached to the papers.

The Chief Justice asked if any importance was attached to it.

Mr. Schreiner said that all grants of land had to be given under the public seal, and in this instance there was only the loose seal which witness had said in his examination-in-chief was tied on to the paper.

Cross-examination continued: The seal was tied on when the papers came into witness's possession. Witness was not sure whether the seal was attached to the deed or the plan. Witness was not present when the papers were given to his father.

The Chief Justice examined the plan, and pointed out that there was a piece of paper pasted on, to which the seal might have been tied.

Mr. Schreiner said that piece of paper was only a bit of an envelope, and it was not likely that the Government would tie the seal on to that.

Cross-examination continued: Some of the headmen were councillors and some were not. Councillors were men who had served their chief for a long time. Some were councillors because their fathers had been councillors before them. Witness had councillors who discussed with him the affairs of the tribe. When they wanted to talk about something, witness called some of the headmen and also the councillors of the tribe together. Some of the headmen would not be called.

In answer to the Court, Mr. Schreiner said he put those questions because he wanted to show that all the tribe were not in favour of that action. Many were opposed to it.

Cross-examination continued: Witness knew nothing about the survey of the Peuline commonage. Witness never called a meeting after the survey of the Peuline commonage, at which caretakers were appointed. Witness knew nothing about one Hermanus impounding some calves found on the commonage, and had never ordered Hermanus to restore those calves, because he could not impound calves grazing on the commonage.

Re-examined: When witness touched his ear on the previous day, when asked as to how the seal was attached to the papers, he meant to show that it was hanging to the papers like an earring.

Mr. Innes said they had examined a number of seals in the Deeds Registry and found that they were all attached to the deeds by a green ribbon, or else tied through a hole in the papers. Underneath the seal of the private secretary on the deed in question there was a piece of green ribbon. His theory was that the green ribbon attached the public seal to that of the private secretary.

By Mr. Justice Buchanan: Witness did not object to grants of building lots being made to people in the mission-station. What he objected to was building lots being cut off only for the use of those people living on the building lots.

Gana Kaba, one of Kama's councillors, and related to him, corroborated generally the Chief's evidence as to the tribe taking possession of the land after the war, and Sir George Grey's issuing the titles thereto to the old Chief Kama. Witness knew the stations at Knapp's Hope and Peuline. In Macomo's time, before Kama came down from Kamestone, there was a mission-station at Knapp's Hope, under old Mr. Keyser. When Kama's people took up the land the mission-station had been burned and the people were scattered. Afterwards Mr. Keyser returned and said to the old Chief that he wanted to live under him. Witness remembered hearing of a surveyor coming to survey Knapp's Hope. Kama objected, and the survey was dropped. When Annshaw commonage was about to be surveyed a large meeting was held, at which the people protested against that being done, and Mr. Bright, the surveyor, left. There were many strangers now living in the territory. Witness did not know that the Chief had been consulted on the matter. If he had been, witness would have known.

Cross-examined: Kama did not consult witness about everything. Witness was present when Kama spoke about Knapp's Hope. Witness did not know if Kama would do anything with regard to Knapp's Hope without witness knowing. Witness did not remember being present when Kama signed a document giving the Knapp's Hope people land for irrigation. He never knew that Kama gave such a document. Witness had never heard of objection being taken to white people living in the Debe section. Simpson was not on the ground mentioned before Kama's people came to the country, but he occupied the piece at Debe before they got the document from Sir George Cathcart. The people objected to the survey of Peuline commonage. It was the red Kafirs, who did not want to get a separate title, who objected. The station people were in favour of the survey, although some withdrew when they found that old Kama was against the commonage. There were no caretakers appointed to look after the commonage. Witness had a garden lot at Annshaw. Witness did not remember Mr. Miller calling the headmen together shortly after they came back from King William's Town and explaining the document they had got from Sir George Grey.

Re-examined: When at Mr. Miller's orders the people occupying land round Fort White were driven away and their huts burned, Kama went to King William's Town and complained to Colonel McLean, who said that he would write to Mr. Miller about it.

Job Sinxo, another headman and councillor, also corroborated as to the tribe taking possession of the land, When the soldiers moved away from Fort White some of Kama's people went and cultivated the land there, but they were turned out by Mr. Bissett and their huts burned. With regard to the Lovedale land, witness accompanied

Kama to King William's Town, where they saw Colonel McLean. Kama then objected to the survey, and mentioned other matters, such as the burning of the huts and the interference with the people working at the drift. Colonel McLean said it would be better to remove Mr. Bissett from the magistracy there, which was done. There were always some people residing within the posts at Fort White. Witness did not know whether those people had title. There were only a few people in the country when witness's tribe first went there. Now the country was full, and there were a number of locations around Knapp's Hope, and if these villages were removed from the commonage of Knapp's Hope, there would be no other grazing ground for them, because behind them were other villages. That was the reason they objected to this commonage being proclaimed. These locations had been there since they arrived in the country. Many of those who had come to Knapp's Hope recently did not belong to Kama's tribe at all. Witness knew of no meeting after they got the papers in 1861. Many people had come among the tribe, especially after the Gaika rebellion, and had intermarried with Kama's people. They were all regarded as Kama's people, except the new-comers who had not got Kama's permission to settle there.

By the Chief Justice: Witness had not seen any new-comers brought to the present chief for permission to settle.

This closed the plaintiffs' case.

Mr. Schreiner put in the correspondence, extracts of Blue-books, Letters Patent and Commission of Sir George Grey.

The Chief Justice asked if there was any chance of a permanent settlement being come to between the Government and these natives, because if the Court gave its decision upon strict law, it might have to do what was really an injustice.

Mr. Schreiner pointed out that there were a great many people in the territory who were not in favour of that action. The Government was not going to do anything harsh or unreasonable. The correspondence put in would show that the different Ministries had always recognised fully the claims of Kama and his people for the services they had rendered to the country. The whole matter had arisen from the imposition of the additional 2s. hut tax under the Act of 1892, as owing to some mistake the people had been informed that the 2s. was not payable although they had always paid under the Act of 1884.

Mr. Innes said it was not a question of the hut tax only.

Mr. Schreiner said that if it had not been for that 2s. tax the case would never have come on.

The first witness for the defence was

Charles Neumann Thomas, chief compiler in the Surveyor-General's Office, who stated that the plan before the Court was a compilation of various plans made from actual survey. The area of the territory in dispute was 64,000 morgen, or about 213 square miles. On the plan a two-miles circle was shown around Fort White. Every grant that had been made by the Colonial Government in that territory was shown on the plan. Annshaw and Peuline commonages were surveyed—the one in 1874, and the other in 1875. Witness held the original survey plans—the one prepared by Mr. Murray, and the other by Mr. Van Reenen. He had not a record of Mr. Bright's surveys. An outspan was shown at Keiskama on the plan. On Mr. Cooper's plan of 1861 all the grants which had been made either before or after the annexation of British Kaffraria were shown. No actual title had been issued for Knapp's Hope. They had a sketch plan in the office. The present position was that the Government had decided to have a commonage for Knapp's Hope and to issue title for building lots. In British Kaffraria title deeds were always issued in duplicate. These duplicates were now under witness's charge, after the annexation all the documents being sent to Cape Town. Among all the title deeds witness could not find one similar to that sued upon in the present case, neither was there any mention of it in the grant book which was kept.

By Mr. Justice Buchanan: The original duplicate grant would be kept in the Surveyor-General's Office.

Cross-examined: The grant book was a history of each case, stating to whom the grant was made, &c. Witness should imagine that would be the case in British Kaffraria also It was possible that deeds might be signed by the Governor in Cape Town, but they would be countersigned by the Lieutenant-Governor of British Kaffraria. As far as witness's experience went he did not think they were quite so particular then as they were nowadays.

Alfred Everitt Murray, Government land surveyor since 1853, said he had had large experience of survey work, particularly in the Eastern districts, having been in Kaffraria since 1856. Witness gave evidence before the Commission of 1882. Witness received instructions in 1873 to survey the Annshaw commonage. That was a survey that had been begun by Mr. Bright. The beacons were pointed out to witness by Mr. Fielding and some of the Annshaw natives. He could not now recollect who the natives were. Witness knew nothing of any dispute about the survey. The old Chief generally objected to the survey, because he thought a commonage was not required. Witness could not recollect William Shaw Kama saying anything. There was no concealment in the survey, and the old Chief knew what witness was about. The only dispute there was, was one between Annshaw and Knapp's Hope. Mr. Fielding solved that dispute. Witness acted according to his decision. There was no objection raised to the survey of ground for Mr. Cumming. Witness left the commonage clearly defined.

Cross-examined: Witness had had experience in the Surveyor-General's office at King William's Town, he having frequently worked there, although not an official. Witness could not tell how the grant-book was kept. Things were very lax in those days.

Re-examined : Witness first saw and made a copy of the title deed in 1882, before the Commission sat. As far as witness knew there was only the small seal. There was a big one, but not attached. The present chief showed witness the plan.

Thomas van Reenen, a Government land surveyor, said he resided at King William's Town, and had carried on his profession in that part of the country since 1872. He surveyed Peuline. Witness's plan was practically adopted by the Government as showing the boundaries of the Colony. Witness knew William Shaw Kama, who had a farm adjoining the commonage. He resurveyed a farm on Kama's instructions. Kama and some of his headmen showed witness the beacons of the farm, and Kama knew witness was surveying Peuline, having shown him the beacons on his own farm. Witness had not surveyed lots inside Fort White lines for Government, although he had done so for private people. He had surveyed some in 1896 for the Government. When witness finished the survey of Peuline commonage he pointed out the beacons to the headmen.

Charles Abercrombie Smith, Controller and Auditor-General of the Colony and a member of the Executive Council, said that in 1874 he was Commissioner of Public Works. Difficulties arose with regard to the survey of Knapp's Hope and Annshaw, and that led witness, along with Mr. Innes, to visit the old Chief Kama. The old Chief was ill, and was represented by his son, William Shaw Kama. The old Chief objected to the commonage at Knapp's Hope, but no objection was taken to the survey of commonage of Annshaw and Peuline. It was not till then that witness had any knowledge of Kama's title deed to the land. The old Chief received from the Government £84 a year and another £60. That was for services rendered in the wars of 1853-56. The hut tax had been levied in British Kaffraria since 1860. In the book there was an entry of amounts paid as rent by natives for land, which he thought would be the same thing as the hut tax. In 1869 the hut tax was made statutory. Witness, as Commissioner of Crown Lands, issued a circular with regard to trading licences in 1864. It would be under that circular that certain leases were granted. During the time witness was in office there was no objection raised to those trading licences. The object was to ensure that fit and proper persons only should have licences, and they also afforded security to the trader against being turned away without cause.

Cross-examined : If witness had then had the knowledge of Kama having a title deed to the land, he probably would not have granted any licence without Kama's permission.

Re-examined : Witness 's statement with regard to his pr obably first asking Kama's permission would not apply to the military rayons.

James Rose-Innes, formerly Under-Secretary for Native Affairs, said that from 1877 to 1879 he was Civil Commissioner for the district of King William's Town. The country occupied by Kama was treated as an ordinary native location. Witness first knew about the title deeds in 1874. With regard to the copy of a letter made by him containing the old Chief Kama's permission to the people at Knapp's Hope to hold certain land for irrigation, witness must have had the original before him when he made the copy, but the original was not now in existence. The title was produced to witness by Mr. Holden, who was the resident Wesleyan missionary at Middledrift. Hut tax had always been paid during witness's term of office. Witness was one of the Commission. The old Chief was very ill. Witness saw him personally, and he told witness he was too sick and his son would represent him. Witness's attention was never drawn to a duplicate of the title. Inspectors were never appointed over those native locations The clerks in charge looked after the matters such inspectors attended to.

Charles A. King, in the Government service, at present stationed at Keiskama Hoek, as one of the additional Magistrates under the Civil Commissioner and Resident Magistrate of King William's Town, said he was stationed at Middledrift from 1884 till January 1, 1894. The functions attached to the office were clerk in charge, collector of revenue, issuer of process, distributor of stamps, and issuer of passes to natives. His district included not only Kama's location but the location known as the Royal Reserve. Hut tax was always paid while witness was there. Hut tax was not paid by those who paid quitrents on building of garden lots. There had never been any difficulty in the paying of the hut tax under the Act of 1884. Acting on instructions, witness in 1893 informed the natives they need not pay the hut tax provided under the Act of 1892. Of course they continued to pay the 10s. under the Act of 1884 but not the 2s. under the Act of 1892. In Kama's country there were thirty separate locations under headmen, who each received a certain salary. These headmen were all under witness. During witness's time there was never any foisting of natives among Kama's people. There were some disputes, principally about gardens. The only one with regard to commonages was concerning Knapp's Hope. There were some disputes as to people ploughing on the Annshaw and Peuline commonages. Witness had no power to settle these disputes, except that he used to arrange them amicably. On the large commonages of Peuline and Annshaw there were squatters, but no villages. On Knapp's Hope commonage there were villages with recognised headmen. The Knapp's Hope people and these people's cattle grazed together. In 1891 witness was appointed Inspector of Tribal Locations at Middledrift. Kama was aware of witness's appointment as such, and he never protested against it. Witness performed all the duties of the office with the exception of the registration of stock, which he could not do owing to the area being too great.

Cross-examined : Witness carried out no special duties as inspector, but just performed the same duties as before. The rights of those people on Knapp's Hope would be affected if the commonage were demarcated. They would have to be, turned off, and the country being crowded they would have no place to go to. There would be about seventy-three families. On the other commonages, Annshaw and Peuline, there were no villages, but numbers of solitary huts were scattered over them. A number of those squatters were also erfholders who had left their lots to get nearer the grazing. In witness's time witness was particular about new-comers, but sometimes it would happen that new-comers got in without his knowledge.

John G. Verity, now Assistant Resident Magistrate stationed at Middledrift, said since he took up that position in January, 1896, he had always collected hut tax from Kama's people. They had never objected to pay the ordinary hut tax. Among those who paid quitrent was William Shaw Kama. He had never objected to paying quitrent. Witness tried to carry out certain instructions with regard to the payment of the special tax of 2s. under the Act of 1892, but Kama and his people refused to pay it, and witness was further instructed by Government not to press the matter. Witness was appointed inspector of tribal matters at Keiskama, but that appointment had been cancelled. When witness went to Middledrift he carried out all the duties of inspector except the registration of stock.

B. H. Holland, Registrar of Deeds, formerly Resident Magistrate of King William's Town, stated that in 1882, before the Commission sat, he saw the document now sued on, and there was then no large seal attached to it, only the small seal of the private secretary. During witness's time hut tax was always paid. No complaints were ever made by Kama regarding new-comers being allowed in his territory.

Cross-examined: Witness never told Kama that the trading leases would run out in a few years, and he (Kama) would get the money for the new lease. There was nothing said about the running out of the leases.

The Rev. Henry Keyser stated that until four months ago he was in charge of Knapp's

Hope Mission-station. Witness's father founded the station. Witness was sixty-seven years of age, and was born in King William's Town, but in 1833 the family removed to Knapp's Hill. In 1835 the Chief Macomo removed them to Knapp's Hope, a mile and a half distant. Witness was in charge of the mission-station from 1890, but on and off before that he had been in charge. Witness's brother had previously been in charge, and had been for some time his father's colleague. The mission-station was destroyed in the Hintza War of 1835, and again it was, along with Lovedale and other stations. destroyed in the 1850 war. Witness had always been under the impression, from what he had been told by his father and brother, that, although they were driven out during the 1850 war, they were back in the country before Kama and his people came there. The station had been re-established twice — once by Sir George Cathcart and once by Sir Harry Smith. Witness recollected seeing a tracing signed by both Sir George Cathcart and Sir Harry Smith. Before Kama came to the country witness's father had taken out, on the west side of the Keiskama, a water furrow, by which over seventy acres were irrigated. Those were the facts in 1861. Witness knew of no villages on the Knapp's Hope Commonage. There was one village just on the boundary. There were seventy-seven applicants for titles to building and garden lots. Those people at present occupied the lots, but had not yet got title. The Annshaw and Peuline people had demarcated commonages and titles to their lots, but witness's people had not. Witness had been for years urging a settlement of that question. In 1893 a survey of Knapp's Hope was decided upon by the Government, but had not yet been proceeded with. Witness was astonished to hear that a large number of strange people were settled there. When strangers came, none were allowed to settle without the Magistrate's consent.

Cross-examined: There used to be a mill on the west bank of the river, which belonged to witness's brother, but so far as witness knew his brother derived no rent from lands.

By the Chief Justice: Witness belonged to the London Missionary Society. Witness thought half of Kama's tribe were Gaikas.

In answer to the Chief Justice,

Mr. Schreiner said he did not wish to contend that Kama and his people had not adhered to the conditions of the grant. He believed they had always assisted the Government when called upon to do so.

Joseph Tele, headman of Annshaw and Peuline, examined by Mr. Sheil, stated that he was chief councillor to the old Chief Kama. Witness was now seventy-eight years of age, and came with the old Chief into the country. Witness gave evidence before the Commission of 1882, and what he then said was true. Witness heard that last year a meeting was called about this case. He had received no notice of that meeting, and neither he nor the people of Peuline and Annshaw were present. At the time witness arrived in the country with Kama, those stations were not there, but Annshaw and Knapp's Hope were in existence at the time Kama and witness went to King William's Town to Sir George Grey about the papers. Witness knew old Mr. Impey, the superintendent of the Wesleyan circuit, who had the document under his care, and handed by him to Mr. Walton, through whom it came to the present Chief. Witness remembered the surveys of Annshaw and Peuline commonages. The present Chief Kama and the old Chief as well knew that those surveys were being made. The old Chief gave permission to the school people to have a survey made, but he did not say whether it was for both the building lots and the commonage. When the commonages were surveyed separate caretakers were appointed for each. These caretakers were appointed by witness and Mr. Holden, but witness did not know whether Kama was aware of the appointment. Between the two commonages there was a village of red Kafirs. On the Annshaw commonage there was only one kraal, and that belonged to a man who had also a garden lot. There were other two people living on the commonage, who had built on and ploughed it. Those two people were not there when the survey was made. At Peuline there were also some people living on the commonage. Witness went to Tembuland after the last Kafir war, the Gaika-Gcaleka, and stayed there for five years. On his return he found some people living on the commonage and ploughing it. He spoke to them but they did not heed him, and then the erfholders went and complained to the Magistrate. That was a question which was still troubling the people, both at Annshaw and Peuline.

Cross-examined: Most of the people who owned garden lots at Annshaw also had lots at Peuline. Witness had never been called to any meetings of the tribe since the dispute about the commonage.

Charles Neumann-Thomas, recalled by Mr. Schreiner, said he had discovered a document dated November 27, 1860, directing that from that date all titles of land in Kaffraria should be made in the name of the Lieutenant-Governor.

Cross-examined: Witness understood that to mean that before that time Colonel McLean had always signed such deeds as Chief Commissioner, and that after the issue of those instructions he had to sign as Lieutenant-Governor.

Elijah Rebe, examined by Mr. Sheil, stated that he was one of Kama's tribe and lived at Peuline. Witness remembered the surveys of Annshaw and Peuline. No objection, so far as witness knew, was ever raised either by the old or the present Chief to those surveys. Witness was then living at Annshaw. Caretakers were appointed for Penline commonage. Some of the persons who had garden lots at Penline ploughed on the commonage. Witness was not one of those persons. Witness knew Joseph Tele, the headman, was annoyed at those people ploughing on the commonage. The people at Annshaw and Peuline also objected. Witness remembered a dispute about one Hermanus, who had ploughed on the commonage, impounding certain calves for trespassing, but Kama ordered him to release the animals from the pound, as he had no right to impound.

Myeneku, a Gaika, living within the boundaries of Kama's location, examined by Mr. Sheil, said he and his elder brother were there before the old Chief Kama and his people. Witness had in his possession a document given to his brother by Colonel McLean, stating that as the bearer had remained faithful to the Government during the whole of the war, he had the authority of the Chief Commissioner to remain with his kraal in Kama's location, on the Penline side. Shortly after Kama came into the country witness and his brother removed their kraal to another spot, owing to a large grass fire burning them out. They reported their removal to Colonel McLean and to Kama. Witness remembered some years ago having a dispute with Mama and another one of Kama's people regarding the boundary of some land. A commission was appointed and boundaries were settled, the Chief Kama being aware of the boundaries settled on.

Solomon Dlakiya, an Amatonga, examined by Mr. Sheil, said he was one of the old Chief Kama's councillors both at Kamastone and Middledrift. Witness was present at a meeting between old Kama and Sir George Grey, when the matter of Mr. Keyser was discussed. That was before Kama got the paper. Sir George Grey told Kama he must respect Mr. Keyser's rights, as he had been there before Kama, and had returned. Witness had never heard the Chief raise any objection to the survey. Witness was not at the meeting held regarding the present action. He never received any notice of the meeting. He was not now a headman. He never signed a power of attorney, and when he heard of his name appearing as one of the plaintiffs, he went to the Government attorneys at King William's Town and complained.

Cross-examined: Witness did not talk with Mentu about this case. He gave £1 to his headman because it was known that Kama would have to incur costs in coming to Cape Town. Witness did not make a speech at the meeting called on the subject. He could not have done so, because he was not present.

By the Chief Justice: All that the headman told witness was that all the people should contribute to the fund. Witness was no longer a councillor to the present Chief, and therefore did not know what Kama was coming down for. The headman only said that Kama was going to Cape Town about land at the Debe.

This close the case for the defendant.

Mr. Innes: The two points are: (1) What were the legal powers of the Governor in Kaffraria in 1861? (2) How did he exercise that power? The first statutory provisions were proclamations. The Governor was empowered to make laws subject to his instructions which provide for an Executive Council. He issued proclamations and orders and later on, in 1860, Ordinances. These were all issued by the Governor alone and no trace of the Executive Council is found in them. Proclamation of 7th September, 1855, part 5 deals with applications for the purchase of land for cultivation; part 6 declares that registration and transfer of immovable property shall be effected in the same manner as in the Colony, but nothing is said as to a Deeds Registry. By Ordinance 1 of 1860, the common law of the Colony is introduced. The Governor has the same power to deal with lands in British Kaffraria as the Governor has in the Colony apart from the Land Acts. He is the representative of the Crown, but his powers are limited by his Letters Patent. *Musgrave* v. *Pulido* (5 App. Ca., p. 111). The sixth section of the Letters Patent empower him to "use the public seal of the territories of British Kaffraria for sealing all things whatsoever that shall pass the public seal of our said territories." The seventh section is in the following terms : "We do hereby give and grant to our Governor and Commander-in-Chief for the time being, in and over the Cape of Good Hope full power and authority, but subject nevertheless to such regulations and directions as may be contained in any instructions which may from time to time be addressed to our said Governor by us for that purpose, to make and execute in our name, and on our behalf, under the public seal of the said territories grants of waste land to us belonging within the same to private persons for their own use and benefit or to any persons, bodies, politic or corporate, in trust for the public uses of the inhabitants of the said territories or any of them . . . ." The instructions to the Governor say that he must consult his Council. I cannot find any reference to the appointment of any Executive Council. *Noble* (South Africa, Past and Present p. 246) says that in 1862 the people were clamouring for the completion of the Government by the appointment of an Executive Council. But the Governor's powers were very wide, and he had the power to deal under seal without the assistance of the Executive Council; this power was not curtailed by the Kaffrarian laws. Government Notice 3 of 1858 promulgates provisions for the disposal of vacant land, but only deals with leases of land; it allows grants to be made to natives under special conditions; it may be argued that any sale should take place under the provisions of this notice, but there is in them no such clause as in our Act, which says that "land can only be dealt with under these Acts." There is only one similar case to this to be found in the Reports of other countries. *Regina* v. *Clarke* (7 M.P.C. Reports, p. 77). That was an appeal from New Zealand; the powers given by charter to the Governor there were similar to those given by the Letters Patent here, and that case bears out the contention that the Letters Patent must be followed provided that the Kaffrarian Statute law does not limit the powers given. As to the intention of the Governor the grant shows that it was to give the land to the plaintiff's predecessors. The old rule that in case of ambiguity in grants the presumption is in favour of the Crown has been departed from in modern times. and such grants are construed by ordinary rules of common sense, justice and the question of intention. *Lord* v. *Sydney Commissioners* (12 M.P.C., p. 497) ; *Forsyth's Constitutional Cases*. The actual state of mind of the parties at the time is important. Kama had occupation of some land at this time and he wanted more. The evidence of Tele and Gana at the Commission of 1882 (Blue-book, G 94 of 1883) shows that he wanted title and Sir George Grey agreed to give him title. As to the form of the document, it is not now sealed, but Kama says there was a seal on it and he would he believed unless the Court finds there is fraud. Murray says he saw a loose seal on it in 1882 : the seal must at some time have become detached : the evidence is all against fraud and points to *bona fides*. I admit that the Governor's procedure may have been irregular but he meant the grant to have some effect.

[De Villiers, C.J. : The land cannot cease to be Crown land unless it has been granted in the form prescribed by law.]

Is there any law that says the Crown cannot part with its land except in a certain way? Suppose Sir George Grey were to say that he meant this to be a grant, but that the formalities were not present to his mind at the time, would the Court hold that the grant was bad because there was no seal?

[De Villiers, C.J. : You might perhaps say that this was a contract and that Kama has performed his part of it.]

We do say that. As to the diagram, it is true it is not signed by a surveyor, but the territory was easily definable.

[De Villiers, C.J. : The land is given for "occupation and use."]

That does not make it less a grant : it only takes away the right of alienation. Kama has fulfilled the conditions of the grant. The stipulation as to resuming the land is similar to the provisions in Act 15 of 1887. Sir George Grey had at this time power to grant lands away on any tenure recognised by law. *De Villiers* v. *Cape Divisional Council* (1875, p. 50). The growth of the land policy was gradual even in the Cape Colony, and so also in Kaffraria. The Governor could have created quite a new tenure, and if such was his intention the Court would not allow the want of the seal to stand in the way. If the defendant's contention is upheld the dominium is in the Crown, and the land can come under the Forest Act by proclamation and be made untenable by Kama. In this way Sir George Grey's manifest intention to give title will be nullified.

[Buchanan, J.: Cannot this document be treated as a contract?]

The Government would say that Parliament has passed an Act to include all Crown land and that this land is therefore included. The other Acts mentioned in the plea have a similar clause to Act 15 of 1887, section 2. If this is Crown land, Act 40 of 1879 (Location Act), and Act 28 of 1888 (Forest Act) would operate, and various other Acts which would make an inroad on Kama's occupation. By Kaffrarian law the grant was good enough to effect a transfer, and annexation did not change the rights of the people. *Cook Brothers* v. *Colonial Government* (S.C. 12, p. 86). The natives are not legally liable to pay hut tax. It is said that they must pay because they have paid for years but the Government cannot get a prescriptive right to levy hut tax.

Mr. Schreiner: The Government recognise the equities of the case and have no intention to treat the natives harshly. It is practically admitted, however, that the formalities of a grant have not been complied with. The document itself is not ambiguous and should be construed by itself but the evidence may assist in doing so. The proclamation of the 23rd December, 1847, annexing Kaffraria, and Government Notice, 17th January, 1849, show the beginnings of dealing with the land under military occupation. Written permission to build was required to be obtained from the officers commanding posts. No Kafir hut was allowed within a rayon of two miles from a post. These regulations were in existence when Kama came in 1853 and when Sir George Grey came in 1858. In 1861 Lovedale, Annshaw, and Knapp's Hope Mission-stations were already established. If the contention for the plaintiff is true Sir George Grey must have made a complete change in the dealing with the natives, neglecting Knapp's Hope, the Lovedale ground in the rayons and the rights of Peuline by overlooking them and giving their land to Kama. If the grant holds good it includes Knapps Hope and Annshaw and the people there could have been turned out. We say the intention was only to give a ticket of occupation. By the Proclamation of 7th September, 1855, registration was required as in the Colony, and for that a survey was necessary; but there is no diagram of this land and no surveyor's signature. Four other farms granted to Kama were surveyed. Ordinance 2 of 1862 enacts that the provisions of Ordinance 97 of the Colony with respect to registration shall apply in Kaffraria. On 7th February, 1861, a sketch of the land was prepared. In the same year Sir George Grey gave Kama a document to show that he had occupation in case of the Governor's death. This document is merely a ticket of occupation.

[De Villiers, C.J.: What is to prevent the Government making a survey and alienating the land?]

The Court would, because of the right of occupation.

[De Villiers, C.J.: The plaintiffs cannot claim by prescription, as they occupied under this document.]

Act 10 of 1870 provides for the making of regulations for lands sold or set apart by Government as native locations, but no regulations have been made under it. Act 29 of 1881. Act 40 of 1879 regulates alienation of Crown land in occupation of natives as locations.

[De Villiers, C.J.: Why cannot Government alienate the land under the Crown Lands Disposal Act?]

Under Act 15 of 1887 there is no power to cut up or sell such land. Act 37 of 1884. The Government is entitled to survey under Act 40 of 1879, to give commonage to Knapp's Hope.

[De Villiers, C.J.: What is a ticket of occupation?]

It is not embodied in any statute and is not derived from any common law, but the Princips can give a right to occupy, and this is binding on him.

[De Villiers, C.J.: Do you say it is a *precarium*?]

I would not say it is a precarious tenure only. There are various tickets of occupation, *e.g.*, at Loeriesfontein in Calvinia.

[Buchanan, J.: Individual title was afterwards given there.]

The document throws upon the Government an obligation not to give the land to others than Kama's people, but not an obligation to allow the *dominium* to pass from Government. It is not necessary for me to show what rights the plaintiffs have; it is sufficient to show that it is not a grant. The provision as to the seal in the Letters Patent is peremptory and not only directory, and the Governor's seal was requisite. The Private Secretary's seal being there shows that no other seal was on the document.

Mr. Innes: None of the plaintiffs have any right to come into court on this document unless it is a grant. They can't come in as having taken advantage of a contract made for them as in *Tradesmen's Benefit Society* v. *Du Preez* (5 Juta, p. 269).

On the suggestion of Mr. Rose-Innes, it was resolved to despatch a telegram to the Magistrate at Middledrift asking him to examine the three title deeds at present in the custody of Kama's wife, and also to telegraph to the Magistrate at Graham's Town requesting him to examine a title deed belonging to Kama, at present in the possession of the Rev. Mr. Chubb, for the purpose of ascertaining whether the seals are duly attached to those deeds.

Postea (Feb. 28th).

De Villiers, C.J., said: Before giving judgment I would like to mention that telegrams have been received from the Magistrates at Middledrift and Graham's Town, the contents of which justified the remarks I made while the evidence was being taken. The telegram from the Magistrate at Middledrift says that he has examined two title deeds in the possession of Kama's wife. Both are dated January 9, 1861, and one has the great seal of the country annexed to the deed by green silk. The seal of the other deed is missing, although there are traces of green silk and wax on it. The Magistrate at Graham's Town states that he has examined two title deeds belonging to Kama there. They both purport to be granted under the seal of British Kaffraria, but there are no seals, and no appearance of such having been attached. Do you contend, Mr. Schreiner, that the mission-stations of Knapp's Hope, Peuline, and Annshaw are native locations?

Mr. Schreiner: It is contended that these are all tribal reserves or locations.

De Villiers, C.J.: Another point I would like to know is whether there is anything in the Acts of Parliament which requires a proclamation proclaiming native locations before they become such.

Mr. Searle: So far as Crown lands are concerned, no proclamation is required. There is, however, a proclamation required with regard to native locations on private lands, and no native locations can be established on such lands without the consent of Government.

De Villiers, C.J.: With regard to the trading licences I understand the Government contends that it has a right to issue those licences.

Mr. Schreiner: Undoubtedly. It was done under Act 3 of 1864. The leases are for twenty-one years. Three of them have run for that time, and the fourth for nearly twenty years, and there has been no objection.

De Villiers, C.J.: This is an action brought against the Colonial Government by William Shaw Kama, as Chief of the Amagqumkwebe tribe of natives, and by certain councillors, headmen, and members of the tribe, for a declaration of rights, for an interdict, and for damages. The defendant admits that Kama is the personal Chief of the tribe, but he denies that the resolution which the plaintiffs rely on as authorising them to sue in this action on behalf of the tribe is legally sufficient for that purpose. For the purpose of the limited relief which the Court feels justified in giving, we are of opinion that the plaintiffs have a *locus standi* in this action quite independent of the resolution alleged to have been passed at the general meeting of the tribe. The case has been conducted with perfect fairness on both sides. The plaintiffs have not sought to impugn the *bona fides* of the Government, past and present, in its dealings with the tribe, while the defendant has not placed any difficulties in the way of a tribe of natives seeking legal redress for their alleged grievances in a court of law. The circumstances which led up to the present dispute may be stated in a few words. As far back as the year 1852 an arrangement was made between the then Governor and High Commissioner, Sir George Cathcart, and Kama, the then Chief of the tribe in question, under which the Chief and his tribe removed from Kamastone, in the Queen's Town division, and were located in a tract of country situated within the limits of British Kaffraria. The arrangement was intended to serve as a reward to the Chief and his tribe for their loyalty to the Queen during previous native disturbances, and at the same time to provide for the security of British Kaffraria by interposing a loyal and peaceful tribe among the more turbulent natives of the territory. On the 29th of January, 1861, title, on individual tenure, was given by Sir George Grey to the Chief and to each of his three sons, including the present Chief, of farms situated in the tract of country already mentioned. In February, 1861, the Chief went to King William's Town, accompanied by his son, the present Chief, and three of his councillors, to see Sir George Grey, who was on a visit to the town. The object of the interview was to obtain title to the land which was said to have been promised to the Chief by Sir George Cathcart. The result was that on the 7th of February, 1861, a document was executed under the hand of Sir George Grey, and under the seal of his private secretary, which was in the following terms: "The tract of country described and shown in the annexed sketch has been given over to the Chief Kama, his family, and tribe, for their occupation and use under such regulations, fiscal or otherwise, as may from time to time be fixed by the Government, and under the conditions that at all times and circumstances they are to protect the road from King William's Town to Fort Hare, to answer for its security from any Kafir molestation, and to detect and apprehend all thieves passing through their country. The Government reserves to itself the right of resuming all lands required for military posts or public works." The sketch attached to the document defines the boundaries of the tract, and shows two so-called rayons, one of which is wholly, and the other partly, within the tract. There must have been some object in inserting these rayons into the sketch, but their meaning is obscure without some knowledge of the contemporary dealings of the Government with the land included in the rayons. One of them surrounded the military post of Middledrift, and the other surrounded Fort White, and within both of them some Europeans were already in occupation of land. As to the Fort White rayon, instructions had already been given to Surveyor Cooper to survey part of the land, and to sub-divide it into sections, and within a few months after the date of the document Cooper sent in his plans of the sections upon which titles were prepared and issued. It is clear that it could not have been intended to give Kama occupation of a military post or of a fort, and it is no forced construction of the document to hold that the rayons were inserted into the sketch in order to show that they were not intended to be occupied by the tribe. On this point there can be no doubt whatever if contemporary statements of the Government as to the objects of the rayons were to influence the Court, but it is safer to be guided by the document itself, and the circumstances under which it was issued. The fact that the Chief Kama and his sons had shortly before received titles, under individual tenure. of portions of the tract and continued to occupy those portions, shows that they did not consider the whole tract to belong to the tribe. The circumstance, moreover, that the document itself reserves a general right to resume lands required for military posts goes far to support the view that the rayons around the existing posts were not given over to the tribe. In fact, however, a small portion was occupied and continues to be occupied by them. The Government, on the other hand, have from time to time continued to issue titles, under individual tenure, to land within the rayons, and have unfortunately also included in such titles land lying outside the rayons. The rest of the tract, exclusive of course of the land granted under individual tenure, to Kama and his sons, has been treated as a vast native reserve situate on Crown land. Under the Acts dealing with native locations, and notably under Act 40 of 1879, the Governor has issued titles of lots to individuals upon quitrent tenure, and has claimed the right to set aside lands adjoining such lots as commonage. Under Act 37 of 1884 the Government claims the right to levy a hut tax upon the occupiers of huts in the locations. Under Act 28 of 1888 the Government asserts that commonages or native locations are included among the undemarcated forests of the Colony. Under Act 33 of 1892 the Government claims the payment of the Divisional Council hut tax, payable in respect of huts in native locations on Crown land. Against these claims the present Chief and his tribe have consistently protested. The Government have even gone further, and have issued permits authorising persons to trade and establish shops upon land within the tract, and have received the rents derived from such permits. It is not clear to what extent the Chief consented to the permits being granted, but if I understand the plea correctly, the Government claims the right to issue such permits with or without the consent of the tribe. The objects of the present action are to have it declared that the land referred to in the document of February, 1861, has been inalienably given over to the tribe, and is no longer vested in the Government, and that the Acts of Parliament just mentioned have no application to the land; to interdict the Government from acting under these Acts, to obtain damages for the alienation of land within the rayons. and to compel the rendering of an account of moneys received by the Government in respect of the permits for shops. The defence is, in effect, that the document relied upon cannot operate as a grant, that the land was and is a native location on Crown land, and that all the acts complained of were done by the Government in the exercise of rights conferred upon it by law. The most important question, therefore, in this case is whether and to what extent the document given to the old Chief in 1861 operated as a grant of the land. If it has the force of a grant this land cannot be regarded as Crown land, whatever other rights the Crown may have reserved in respect of it. It is important then to ascertain what authority the Governor and High Commissioner had to execute the alleged grant in the form in which it was executed. The powers of a Governor are limited by the terms of his commission, and the powers of Sir George Grey must therefore be ascertained from the terms of his commission. The seventh clause confers on him full power and authority to make and execute in Her Majesty's name, under the public seal of British Kaffraria, grants of waste land belonging to the Crown to private persons for their own use and benefit, or to any persons, bodies politic or corporate, for the public uses of the inhabitants of the said territory. To be valid as a grant, the instrument must be under the public seal of British Kaffraria; was the document in question under such a seal? The only seal attached to it is that of the Governor's private secretary, but the Chief William Shaw Kama produced a separate piece of circular cardboard, adhering to which is sealing wax, on which the public seal is duly impressed. This is the form of seal which at that time was attached to Kaffrarian grants of land by means of a string of ribbon passed through the paper. The Chief say that the seal produced by him was in some way suspended from the document, but he is very hazy in his recollection on the point. As there was no indication on, the document of such a seal having been attached, I suggested the possibility of its having dropped from one of the real grants admittedly given to Kama, and retained as if it belonged to the document in question. To test the correctness of the suggestion it was agreed by counsel that the Magistrates of Graham's Town and Middledrift, who have access to the grants, should be communicated with by telegram, and their answers make what was a mere possibility an extreme probability. The grants to the present Chief and one of his brothers have no seal attached. Of the two other grants, which are in the possession of Kama's wife, "one has seal in red sealing-wax of British Kaffraria annexed to title by green silk ribbon, the seal of the other title is missing, although silk and traces of wax are still attached." Considering that the document in question purports to be executed only under the hand of the Governor and that the seal of the private secretary is attached to it, I am satisfied that it was not executed under the public seal of British Kaffraria. It cannot operate as a grant of the land, nor indeed could it have been intended to operate as such. It was not registered as a grant, and can only be regarded as an informal document intended to satisfy Kama and his tribe that they would not be disturbed in the occupation of the land, the boundaries of which, with the exclusion of the rayons, were indicated on the sketch attached to the document. The land was to remain Crown land, but it would also continue to be a reserve for the use and occupation of the loyal Chief and his loyal tribe. Such an arrangement would be unworkable if made with persons accustomed to individual tenure, but it would be intelligible to the native mind, which knew only of tribal tenure. In America similar questions have occupied the attention of the Courts, and in the case of *Strother* v. *Cathey* (3 D., 683) it was said by the Court that the title of Indians to lands is regarded by the European and American Governments as a mere possessory right. In another case (*Breaux* v. *Johnson*, 50 D., 555) it was said that "while the different nations of Europe respected the rights of the natives as occupants, they all asserted the ultimate title and dominion to be in themselves." The document given to Kama placed upon record that the tract described in the sketch had been given over to him, his family, and his tribe for their occupation and use, but it also reserved the right of the Government to make such "regulations, fiscal or otherwise" as might from time to time be expedient. The consideration for thus "giving over" the land was not only the past loyalty of the tribe, but the fulfilment of the conditions imposed on the Chief and the tribe by the document itself. It was, in my opinion, quite within the scope of the Governor's authority to make the arrangement with Kama, provided that the instrument did not operate as a grant of the land. It is not denied that the conditions imposed upon the Chief and his tribe have been loyally fulfilled by them. The question then arises, to what extent does the document impose a legal obligation upon the Government? After careful consideration, I see no reason why the principles laid down by this Court in the case of *Tradesmen's Benefit Society* v. *Du Preez* (5 Juta, 269) should not be applicable. For valuable consideration the Governor in 1861 promised the Chief that the land would be reserved for the use and occupation of himself, his family, and his tribe, and of this promise the present Chief and the present members of the tribe may legally avail themselves. The transaction created a trust, out of which arises a promise to those who can now prove themselves to belong to the family or to the tribe. The promise was, in my opinion, legally binding upon the Government, and it remained so binding except in so far as the Legislature may have passed any enactments which are inconsistent with the fulfilment of such a promise. Unfortunately for the plaintiffs some of the Acts to which I have referred, while dealing with native locations on Crown lands, seem to have ignored the assurance given by Sir George Grey to the old Chief and his tribe. The imposition of a hut tax might fairly fall under "fiscal regulations," but the granting of lots to individuals on quitrent, the setting aside of commonages, and the afforestation of the land may have the ultimate effect of putting an end to the tribal tenure altogether, if not of taking away the land from the tribe. It does not appear whether the document executed by Sir George Grey in 1861 was brought to the notice of the Legislature before the Acts in question were passed. As late as the year 1875 Mr. Brownlee, the then Secretary for Native Affairs, addressed a pathetic letter to the old Chief in which the following passages occur: "In the war of 1835 you were found on the side of the Government, again in the war of 1846 you were faithful, and rendered good service: and in the great war of 1850 you remained unchanged, and again you and your people fought on our side. All these services induced the Government to give to you, a small Chief of a minor tribe, a country better and larger than the one which you formerly occupied. This country has been secured to you and your people by title, and nothing can dispossess you of it except your own act, and that is rebellion against the Government that put you in possession." If Sir George Grey's undertaking, and the subsequent confirmation and amplification of it by Mr. Brownlee had been brought to the notice of Parliament, the tract of land given over to Kama as a native location would, I conceive, have been excepted from the operation of the harsher provisions of the Acts to which I have referred. This Court can only construe these Acts as they stand, and cannot introduce an exception which the Legislature, whether intentionally or inadvertently, has omitted to enact. But Mr. Schreiner has candidly admitted that Acts dealing generally with Crown lands have no application to native locations, including the tract now in question. It does not appear that the trading permits were granted under any Act, and I certainly am of opinion that the Government has no right, in the face of Sir George Grey's undertaking, to issue any fresh permits within the tract. The 7th section of Act 15 of 1887 empowers the Governor, with the concurrence of both Houses of Parliament, to set apart trading stations within native locations, but no such concurrence is alleged in the present case. There is a difficulty in the way of ordering the Government to account for the rents received, seeing that the Chief seems to have acquiesced in the rents being received by the Government, and that there is no duly authorised person to receive and expend the money on behalf of the tribe. Some of the titles to land outside the rayons were issued under Act 37 of 1882. That Act clearly does not apply to Crown land on which there is a recognised native location, and the granting of the titles was, therefore, a contravention of the plaintiffs' rights. In regard to the mission-stations of Knapp's Hope, Annshaw, and Peuline, the plaintiffs ask for an interdict restraining the Government from granting any titles or causing any lots of ground or commonage to be surveyed. If such an interdict had been applied for before the passing of the Act 40 of 1879 the legality of the action of the Government might perhaps have been open to question, but that Act, read by the light of Act No. 8 of 1878, justifies the subsequent conduct of the Government. It is impossible to hold that these mission-stations are not native locations situated on

Crown land, but it is understood that titles will only be issued in favour of inhabitants who have been adopted by the Chief as members of the tribe. The result is that the Court will declare that the Government is not entitled, in respect of land situate within the tract but outside the rayons figured in the sketch attached to the instrument executed by Sir Geo. Grey in 1861, to grant titles under Act 37 of 1882 or to issue permits or leases for trading-stations or shops, but as to the remaining prayers of the plaintiffs there must be absolution from the instance. The Court would suggest that as compensation for land granted outside the rayons the Chief and his tribe should be allowed to retain the occupation of the portion occupied by them within the rayons. The plaintiffs have succeeded on one important point, and considering that the Government has received the rents of the shops and trading-stations, and that it was for the public interest that all the questions raised should be judicially determined, we are of opinion that the costs should be paid by the Government.

Buchanan, J., said : I concur entirely with the Chief Justice on the two main issues in this case, namely on the question of title, and on the rights secured to the tribe of Sir George Grey. On the first point, the power conferred on the Governor and High Commissioner by his commission, to make a grant under the public seal, was never exercised. Considering also the invariable practice established in the Colony of registration of title, it is clear that there never was any vesting of the dominium in this land in the Chief and his tribe. The tract of country in question therefore remained Crown land. But though that be the case, the document issued by the Governor is not valueless. In my opinion it conferred rights on the plaintiffs which the Government is bound to recognise. What the limit of those rights is, it is difficult accurately to define, but they are shortly expressed as the rights of occupation and use of the country. I am prepared to go so far as to say that there was a grant to this tribe of the sole right of such occupation and use. It follows that the Government are not justified in giving to outsiders any rights or privileges in regard to the land within the tract set aside for the tribe. The document renders the occupation and use by the tribe subject to such regulations, fiscal or otherwise, as might from time to time be fixed by the Government. At that period the country was administered as a Crown Colony, and legislative as well as executive functions were vested in the Governor, and he could then alone have made any such regulations. Since the annexation, however, the legislative authority was vested in Parliament. Consequently any Acts of Parliament which were explicit enough to include this part of land must be held to apply thereto. So much for the two main issues which have been raised. On the minor point of the land included in the rayons around the military posts, I concur in the opinion that it was excluded from the tract of country reserved for the tribe. It is a pity that the compromise proposed by the Commission in 1882 was not adopted, for it would appear that it would have been beneficial to the tribe, as the land now occupied by Kama's people within these rayons measured about 3,000 acres, while the land granted to others outside was only about 1,400 acres. It may yet be agreed to set the one off against the other. It is unnecessary for me to go over all the other points in the case. I wish, in view of the importance of this action, more particularly to emphasise our complete agreement on the main issues, and to say that I fully concur in the decision which has just been pronounced.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton ; Defendant's Attorneys, Messrs. J & H. Reid & Nephew.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and Hon. Mr. Justice BUCHANAN.]

PROVISIONAL ROLL.

FISHER V. H. CUTLER. { 1898. Feb. 28th.

Mr. Buchanan applied for the discharge of a provisional order in this case, granted on February 28, 1898. He appeared for the plaintiff, and a consent paper had been signed.

Order granted.

SAMSON V. W. R. WARHAM.

Mr. Currey applied for an order for the final adjudication of defendant's estate.

Defendant appeared in person to object to the granting of the order.

Order granted.

MASTER V. H. HEROLD.

Mr. Sheil applied for an order calling upon defendant to file accounts in the estate of which he was executor.

Order granted.

ILLIQUID ROLL.

ANDERSON AND ANOTHER V. DAVIES AND ANOTHER.

Mr. Buchanan applied for judgment under rule 329 for the sum of £120, being purchase price of the goodwill and stock-in-trade of a greengrocer's shop, situated in Main-road, Sea Point.

Granted.

GENERAL MOTIONS.

LOFTHOUSE V. LOFTHOUSE. { 1898. Feb. 28th.

This was an action for divorce brought by Thomas Oswald Lofthouse against his wife, Amy Lofthouse, on the ground of her adultery.

Mr. Graham appeared for the plaintiff; defendant in default.

R. H. Barry, clerk in charge of the marriage register in the Colonial Office, produced the register containing the entry of the marriage of plaintiff and defendant.

Thomas Oswald Lofthouse, the plaintiff, stated that he was married to the defendant on July 18, 1893. After marriage they lived unhappily together, owing to a disagreement concerning a boarder, and also on account of the defendant's intemperate habits In December, 1895, they separated. Recently on information received, witness brought the present action. There were no children of the marriage.

By the Chief Justice: Defendant had been divorced before she married witness. In those proceedings she was the plaintiff.

John Morkel stated that in December, 1897, he was living at a boarding-house occupied by Mrs. Van Duyn in Loop-street. Mrs. Lofthouse was living there, and one morning she asked witness if a gentleman came to send him upstairs, as he was her husband. In the evening a gentleman came, and witness took him upstairs, and he went into Mrs. Lofthouse's bedroom. When witness took the man to the bedroom door, it was opened by Mrs. Lofthouse. Witness said to the man, "Here is your wife," but he said it was not his wife. She then called the man by an endearing name and they went inside together. Plaintiff was not the man.

Jacob van Duyn, proprietor of the boarding-house in Loop-street, gave evidence as to defendant coming to live there. On December 12 or 13 a gentleman came to see her and stayed in the bedroom with her for two or three hours. Defendant did not stay long at witness's house after that, as witness gave her notice to quit. Plaintiff was not the gentleman who went into defendant's room with her.

Mr. Graham handed in an affidavit made by Alexander Shepworth, who was certified by a doctor at Wynberg to be in the hospital there suffering from paralysis and unable to appear and give evidence. In this affidavit Shepworth stated that in September, 1897, he was a billiard marker at the Café Royal in Church-street, where defendant was also employed as a barmaid. Shepworth deposed that during December he saw a man go with defendant into her bedroom one night, about 10.30, and on the following morning he saw the man leave. On the proprietor of the café being informed of the occurrence, the defendant was dismissed.

Decree was granted.

[Plaintiff's Attorney, D. Tennant.]

DE JONGH V. DE JONGH. { 1898. Feb. 28th

This was an action for divorce brought by Abraham Willem de Jongh against his wife, on the ground of her adultery. He further prayed for the custody of the child of the marriage.

Defendant admitted the adultery, but pleaded that there had been condonation on plaintiff's part.

Mr. McGregor appeared for the plaintiff; Mr. Buchanan for the defendant.

Abraham Willem de Jongh, the plaintiff, stated that he was married to defendant on January 1, 1894, in community of property. There was issue of the marriage, a boy, now about three years old. For some time after marriage they lived at Malmesbury, but in March, 1896, witness went to Bethlehem, in the Free State, leaving his wife with her parents at Malmesbury. She did not object to his going to the Free State. He left her with enough money for her support. Witness returned from the Free State on August 3, 1897, owing to information he had received. On August 7 he saw his wife at Wynberg, where she was living with her parents. She was then *enceinte*. Witness had never cohabited with her since he left for the Free State in March, 1896. If he obtained the custody of the child his mother at Darling would look after it.

Cross-examined: Witness denied having cohabited with defendant on August 8 and 9. He had not contributed to her support since then.

Jan Wittle gave evidence as to having committed adultery with defendant at Malmesbury several times during her husband's absence.

Moses Johannes Hermanus de Jongh, father of the plaintiff and gaoler at Darling, gave evidence as to his son returning from the Free State, and going to Wynberg to see his wife. When he returned he told witness that he had seen his wife, and had refused to forgive her.

This closed the case for the plaintiff.

For the defence,

Florentina Maria Johanna de Jongh, the defendant, admitted the adultery, but said that when her husband visited her on Saturday, August 7, he forgave her, and on the two following days cohabited with her. She detailed the circumstances, stating that her sister-in-law and her brothers had seen them in bed together. Plaintiff had sent her money since he returned to the Transvaal.

Sarah Rooda, a midwife, gave evidence as to the cohabitation of plaintiff and defendant in August last.

Esau Peterson gave evidence as to directing plaintiff to defendant's house on August 7. He again saw him there on August 19.

Christian Johannes Lategan, a brother of the defendant, gave evidence as to the cohabitation of plaintiff and defendant.

The Court held that condonation of the adultery had been proved, and gave judgment for the defendant. With regard to the child of the marriage, an order was made giving the custody of it to the plaintiff. No order was made as to costs.

[Plaintiff's Attorney, D. Tennant; Defendant's Attorney, C. C. Silberbauer.]

BRITTAIN V. THIEME.

1898.
Feb, 28th.
March 1st.

Broker—Commission.

A broker having been indirectly employed to sell a farm belonging to the defendant, introduced an intending purchaser S. *to the defendant, who thereupon entered into negotiations with* S., *with the result that* S. *bought the farm, as well as a second farm belonging to the defendant.*

Held *that, although the broker was entitled to commission in respect of the farm which he had been employed to sell he could not claim commission in respect of the sale of the second farm.*

This was an action for the recovery of £49, brokerage at the rate of 2½ per cent. on £1,795, the purchase price of certain two farms sold by defendant to Mr. John Scott, jun., plaintiff alleging that it was through his introduction of Mr. Scott as a purchaser that the sale was effected.

The defendant denied that the sale had taken place through the instrumentality of the plaintiff.

Mr. Molteno appeared for the plaintiff; Mr. Joubert for the defendant.

George Brittain said that he had practised as a broker in Cape Town for many years. In March last a Mr. Crockett came to witness, and said that a farmer named Thieme living on the Claremont Flats was anxious to sell a farm, but he (Crockett) had told Thieme that he was not a licensed broker, but would place the matter in witness's hands, having known witness for some time. Witness told Crockett that his commission would be 2½ per cent., and requested him to come back in a week's time. In the meantime witness went and saw Mr. John Scott, junior, tailor, in Church-street, who said he was anxious to buy a farm for the purpose of sub-dividing and re-selling. Witness said he did not know the size of the farm, but would see him again. Afterwards Scott went to Claremont, and was introduced to Thieme by Crockett as a probable purchaser. That was on a Saturday, and the following Monday Scott sent for witness, and said that he had seen the farm, but it was rather too small; that Thieme, however, had offered him a larger farm, but there were certain difficulties in the way owing to which he could not give transfer. Scott said he had arranged for Thieme, witness, and himself to meet, along with an interpreter, at his office. On the Saturday the meeting took place, there being present Scott, Thieme, his wife, and Lucke (an architect living above Scott's office), who acted as interpreter. When witness went in the first thing Scott said to Thieme was, "This is Mr. Brittain, the broker, who sent me down to inspect your farm." That was interpreted to Thieme. Witness said to defendant, "Has Mr. Crockett mentioned my name to you?" Defendant nodded his head in reply. The first part of the conversation was about the transfer, Thieme explaining through Lucke that he had got the farm under special conditions, which would not expire until July, when he would be able to give transfer. Thieme said the proper price for the two farms would be about £2,000, but Scott could have the small farm for £500. Scott said he did not want the small farm, but Thieme would not fix a price for the large farm, because he said he did not know how much it would cost. Scott told Lucke to impress upon Thieme that he must not take the selling of the farms out of witness's hands, nor sell them to anyone else except himself (Scott), or the Government would fine him £50. Lucke said that was all rot. Thieme seemed to understand perfectly well what was said to him. Two or three times after that meeting witness saw Scott, who said he would tell him when the bargain was closed. That was during the first few weeks, and then Scott began to grow a little cold about the matter, and finally said that he did not want the farms. Witness came to hear of the sale of the farms to Scott about August, but on taxing Scott with that he denied it. Afterwards witness spoke to Scott about the brokerage, and endeavoured to get Thieme's address from him, but he said Thieme had gone to Germany. Witness posted a letter to Thieme asking him for the amount of the commission. Subsequently witness met Thieme, but before he could speak to him, Thieme ran away into Ludolph's room. Scott afterwards told witness that he had got a note from Ludolph for the brokerage, but he had sent it back, as it was witness and not Ludolph who was entitled to the commission. Witness had ascertained from the Inspector of Licences that Ludolph had taken out a broker's licence on August 1, but had not renewed it this year, saying that he only took it out for a special purpose. Witness believed that Scott had since sold a good deal of that land.

Edouard Lucke said he was a German, and that in March last he interpreted at the meeting between Scott, Thieme and Brittain. Witness interpreted to defendant that Mr. Brittain was the broker in the matter, and that Crockett had nothing to do with it, and that Mr. Brittain was entitled to his commission. A conversation ensued regarding the farms, Scott demurring to purchase the small farm unless he could purchase the larger one also. There was some difficulty in the way with regard to the transfer of the larger farm, but eventually it was agreed that Thieme would not conclude the sale of the farm to anyone else without giving Mr. Scott the first refusal, and that in the matter Mr. Brittain was the intermediary. That was clearly understood by defendant.

By the Court: No special farm was mentioned. Witness explained to Thieme at the Saturday meeting that he would have to pay commission on the transaction then going on Witness attended subsequent meetings between Thieme and Scott, when the conversation was simply about the price of the farms. Brittain was not at those subsequent meetings.

Roden Crockett corroborated the evidence of Mr. Brittain as to the placing of the sale of the farms in Brittain's hands and Scott's visit of inspection to the farm. He could not say that they then inspected the larger farm, but they saw the beacons. Witness made Thieme understand that he would have to pay Brittain commission.

For the defence.

Johan Frederick Thieme stated that at the beginning of the year he had some property on Claremont Flats. On one occasion, on a Christmas forenoon, Crockett came to witness's house in company with one Burgundy. Witness never knew Crockett before that time, and never said anything to him about selling the farm, but Burgundy asked witness if his son would sell his farm. Subsequently Crockett and Scott came to look at witness's son's farm. Witness said the price of the farm was £600, and Scott said that was a little high. Then Scott asked witness for the papers, and he told him that he had papers, but they were only licence papers. Afterwards by arrangement witness and his wife went to Scott's shop, and there met Scott, Brittain and Lucke. They had a conversation, in the course of which witness was asked to sell his farm and was offered £1,275, but he said he did not want to sell. Nothing was said about his son's farm. Brittain was not introduced to witness as the broker. Afterwards witness sold the farms out of hand to Scott, the price being arranged and everything settled at Scott's office. No commission had yet been paid to anyone.

By the Court: Witness never asked Crockett to sell the farm, and the latter never said to witness that he would get a broker to do so. Between the time the meeting took place in Scott's office and the time witness sold the farms he never met Brittain, except on the occasion when the latter followed him into Ludolph's office. Brittain then asked for his commission. but witness said he did not know him, and that he had no right to ask for commission.

Cross-examined: Witness never gave the size of the farms to Crockett.

Julia Thieme corroborated the evidence of her husband with regard to the visit of Crockett and Scott to the farm, and the meeting between her husband, Scott, Lucke, and Brittain at Scott's office.

Cross-examined: At that meeting Lucke never told witness's husband that Brittain was the man who sent Scott. Crockett never said anything about a broker.

Henry Burgundy, a painter, living at Claremont, said that on a Sunday he and Crockett went to Thieme's farm. Crockett had never been there before, and did not know Thieme. Witness and Thieme had a conversation about selling a farm belonging to Thieme's son, and Thieme said that if witness or Crockett knew of a purchaser they might let him (Thieme) know. Nothing was said about a broker.

Louis Ludolph, a conveyancer, said he had business relations with Thieme, who came into his office one day followed by Brittain. Britain asked for Thieme, but the latter said he had nothing to do with him, aud that he did not know that man. Witness then suggested that Brittain had better see Thieme afterwards. Brittain then left without saying anything more. The business witness had with Thieme was in connection with the farms. Scott came to witness to do the conveyancing. On July 24 Scott and Thieme came to witness and said they had bought and sold the farm of Thieme's son. Witness drew up the conditions of sale, and told them they would have to wait for the title as it had not been issued. Nothing was said about a broker. Afterwards Scott and Thieme met at witness's offices. Scott wanted Thieme to grant him pre-emptory rights over the farm, but Thieme would not agree to that, and wanted to sell outright. After discussion witness got them to agree to a sale. The sale went through, and witness claimed commission. Subsequently witness took out a broker's licence, and issued a broker's note, for the special purpose of binding the bargain.

Cross-examined : Witness positively denied having been asked to interpret at the meeting between Scott, Thieme, and Brittain. Witness passed the broker's note, but subsequently when Thieme's attorney took proceedings against him, he acting on the advice of a friend, returned the money (£38 10s.) received for commission. Witness remembered meeting Brittain, and the latter asking for Thieme's address, but witness did not give it to him, because about September or October Scott had told witness not to give that address, as Brittain claimed something from Thieme. Witness sent Scott the broker's note on July 31, and Scott returned it on the following Monday. It was not the case that Scott only returned the note when he heard that there was to be a lawsuit about the matter.

John Henry Widdicombe Scott, tailor in Church-street, said that some time last year he was desirous of buying some property on the Flats, and mentioned the matter to Brittain. One morning Brittain met witness and said that he had something that he thought would suit, and that he would try and get particulars. Afterwards he gave witness Crockett's address at Claremont, and witness went with Crockett to look at the small farm belonging to Thieme's son). Crockett said out there that he wanted £50 from Thieme if the sale went through. Witness asked Thieme if that was correct. Thieme said it was, and asked if he should give Crockett that money. Witness said he would only be entitled to 2½ per cent. even if he were a broker, which he was not. At the meeting at witness's office, Brittain only came to the door, and witness said, "Mr. Thieme, that is Mr. Brittain." The latter just stayed a few minutes, and asked Lucke to look after the matter for him. Brittain had previously told witness to get either Ludolph or Lucke to interpret, and he would pay for the same. At the meeting they only talked about the son's farm. Thieme must have made a mistake when he said they only talked about his farm and not the son's, Nothing resulted from that meeting, but on May 23 witness got an option from Thieme for the purchase of the farms, which he exercised in July.

Cross-examined : Witness never told Ludolph not to give Thieme's address to Brittain. Witness admitted that he would never have known of those farms if it had not been for Brittain.

Mr. Molteno cited *Roux* v. *Brittain* (9 Juta, p. 219) : *Moir* v. *Watts* (G. 5, p. 109): *Mansell* v. *Clements* (9 L.R.C.P., p. 142). The purchaser and vendor would never have met except through the instrumentality of the plaintiff.

Mr. Joubert ; Crockett was the man instructed by the defendant and the man who brought the parties together. The defendant knew nothing about Brittain and did not employ him.

The Chief Justice said : There is considerable conflict in the evidence, but the true facts of the case seem to me to be reasonably clear. Mr. Crockett seems to have had some degree of intimacy with the defendant, and visited him on two or three occasions, and he came to know that defendant wished to sell a farm belonging to his (defendant's) son, and he understood, also, from the defendant, that he had authority to sell it for him, but that as he (Crockett) himself was not a broker he was to employ a broker. I think we may take it that Mr. Crockett's evidence on that point may be accepted. Mr. Crockett then saw Mr. Brittain and informed him that this farm was for sale, and asked him to act in the matter. Thereupon Mr. Brittain, as a broker, knowing that Mr. Scott wished to buy property which he could sub-divide, saw Mr. Scott and handed over to him a memorandum in which the property was minutely described. Clearly, therefore, Mr. Brittain had got full information which he imparted to Mr. Scott. It was then arranged that Mr. Scott should go to the farm, and he met Mr. Crockett, because on that memorandum Mr. Crockett's address was given. The two then went together to the farm. They inspected the smaller farm, and incidentally the beacons of the larger farm were pointed out, but nothing was done with regard to the larger farm at all. Mr. Scott came back to Cape Town, and it was arranged that Thieme, Scott, and Brittain should meet in Scott's office. They did meet, and Mr. Lucke was employed as interpreter. On the whole it seems to me that the evidence of Mr. Lucke may be accepted, as he appears to have no interest in the matter. It was then distinctly stated that Mr. Brittain was a broker, and that he was to be entitled to his commission in respect of what he had done. I do not think that before that time Mr. Thieme knew that Mr. Brittain was the broker in the matter ; but there was a clear intimation to him then that Mr. Brittain was the broker. If afterwards this farm was sold to Mr. Scott, who had been introduced to Mr. Thieme by Mr. Brittain, that gentleman was entitled to his commission even if he no longer took any part in the transaction. Mr. Brittain had introduced the two parties, and it was through his instrumentality that the sale had, to all intents and purposes, been effected. Therefore, with regard to the sum of £425, I have no doubt whatever that Mr. Brittain is entitled to his commission. But the plaintiff goes further and claims also brokerage in respect to another farm, which formed no part of the original transaction, which plaintiff did not intend to sell at the time at all, and which only came to be sold because when Mr. Scott and Mr. Thieme met the latter discovered that Mr. Scott wanted another farm. With respect to that farm, the plaintiff has no claim to brokerage, and I think what was said with regard to brokerage must be confined to the farm with which plaintiff was concerned, and not be extended to another farm with which he had nothing to do. The ultimate sale did not take place through his instrumentality at all. It is true that if Scott and Thieme had not been introduced the second sale would not have taken place at all, but that is not the test. The question is whether the two parties were introduced in the first place with a view to the sale of the two farms or the one farm. It is clear that on what took place afterwards with regard to the sale of the second farm the broker is not entitled to any commission. Judgment will therefore be for the plaintiff for the sum of £10 12s. 6d.

Mr. Joubert submitted that only Magistrate's Court costs should be allowed. Act 20 of 1856, sections 34, 35. No part of the clause of action arose in the defendant's district.

De Villiers, C.J. : It seems to be a case of sufficient importance to be tried here. Judgment will be for plaintiff with costs.

[Plaintiff's Attorney, D. Tennant ; Defendant's Attorney, C. W. Herold.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice BUCHANAN.]

RYNHOUD V. RYNHOUD. { 1898. March 1st.

This was an action for divorce brought by Henrietta Alicia Rynhoud against her husband on the ground of his adultery. Plaintiff also claimed the custody of the children of the marriage, and the sum of £500, the amount of property she put into the joint estate when she married defendant.

Mr. Schreiner, Q.C., appeared for the plaintiff ; defendant in default.

R. D. H. Barry, clerk in charge of the marriage registers in the Colonial Office, produced the certificate of the marriage of plaintiff and defendant.

Henrietta Alicia Rynhoud (born Jones) stated that she was married to defendant at Cape Town on January 10, 1888. At the time of her marriage she was possessed of about £500, and had also some jewellery and plate. She and her husband went to Australia, where one child was born. In 1890, her husband deserted her. He then went under the name of Evans. Witness had to get assistance to enable her to return to Cape Town, where on her arrival she went to live with her husband's father. Her husband returned to the Colony in December, 1890, having had to work his way back. They afterwards lived together in various parts of the town, her husband holding different situations in succession, and finally getting employment at Attwell's, driving one of the bread carts. In February, 1897, they went to live in Grey-street. There were eight children of the marriage, five of whom were alive—three girls and two boys—the eldest child being about nine years and the youngest six months. While witness was ill in August last her husband did not take his meals at home, but told her he had his meals at Mrs. Ridley's. On November 2, at defendant's request, she went to see Mrs. Ridley. On November 19 defendant brought Mrs. Ridley to their house. She was crying, and defendant said she was in great trouble with her husband. Defendant asked witness to allow her to remain until she got employment. As she was in trouble witness consented. Defendant said he had brought her from the Young Women's Christian Association. There had been incidents during the past year that made witness hesitate before she consented to Mrs. Ridley remaining. After that her husband and Mrs. Ridley sometimes went out together, returning home very late, sometimes as late as 11.30. Once while they were sitting on the stoep her husband put his arm round Mrs. Ridley. Witness spoke to them, and they said they did not mean anything. One Sunday morning they wanted to go up the mountain at four o'clock, but witness objected, and they went later on. They returned at 11.30, and defendant asked witness to prepare the breakfast, although they usually had dinner at one o'clock. Witness objected, whereupon defendant got into a temper and said that she must leave the next day at noon, at which time he would send a cab for her. A little drink affected him, and that day he had been drinking, and eating nothing. They had a violent quarrel, and witness left the house and went to see his brother, who lived in Loader - street. When witness and defendant's brother returned the door was locked, and defendant spoke to his brother, saying that what he had done that day could not be undone, and that he was dead to his wife, dead to his children, and dead to the world, and that the other woman would look after the children. On a subsequent occasion, when witness went to take her little boys away from the house, she had a quarrel with Mrs. Ridley, and reported the matter to the police. She was staying at a sort of home with Sister Jane and Mrs. Smith, and on December 12 she went to try and arrange terms with her husband, but he threatened her with a revolver. Witness was able to support the children. She did not know of her own knowledge what had become of her husband. When they were married defendant had no means.

Louisa Holt stated that she lived at 7, Grey-street, near where plaintiff and defendant lived. Witness knew plaintiff left in November. Mrs. Ridley also lived at the house, and witness had seen her there frequently after the plaintiff left.

Emily Gardiner also gave evidence as to Mrs. Ridley living for about a month with defendant after the plaintiff had left the house.

George Ridley, an engine-driver in the employ of the Harbour Board, said he had lived with his wife up to November 18 last, when she left her home. Rynhoud brought bread to the house, but witness had no reason to suspect intimacy between his wife and Rynhoud. On the day she left they parted on good terms. Witness went to his work, and when he returned she had gone, taking all her clothes. Afterwards he had a conversation with his wife, but after she left the Young Women's Christian Association whither she had gone, he did not know for some time what had become of her. Subsequently he went to defendant's house in Grey-street and found his wife living there. She refused to return with witness. Rynhoud was present. Witness followed his wife into the bedroom and there saw his wife's dressing gown hanging near the bed, and a gentleman's watch on the table. The bed was made up for two persons. Previously, on November 22, witness asked Rynhoud about his wife's whereabouts, but Rynhoud said he did not know where she was.

By the Court: When witness went to Rynhoud's house his wife said she loved another, but indicated that it was not Rynhoud she meant.

Examination continued: Witness had not yet instituted any proceedings against his wife, but intended to do so when his means would admit.

Michael Gerrity stated that on February 10 last he saw Rynhoud at the North Pier. He asked witness if he could take his friends off to the steamer Narrung, which was about to leave for Australia. Witness agreed, and subsequently took Rynhoud and Mrs. Ridley to the steamer, and saw them on board. The tug took the heavy luggage. Rynhoud and Mrs. Ridley remained on board, and did not return either with the tug or witness's boat. The steamer sailed about an hour and a half afterwards.

No more witnesses were called, the Chief Justice intimating that he thought sufficient proof had been tendered, and besides, the defendant did not appear.

The Court granted a decree of divorce, declared that the defendant had forfeited all benefits arising out of the community of property, and granted plaintiff the custody of the children of the marriage. Judgment was also given against the defendant for £250.

[Plaintiff's Attorney, C. C. Silberbauer.]

VAN DER POEL'S EXECUTORS v. MALAN.

1898.
Mar. 1st.
„ 2nd.

Release—*Acceptilatio*—Executors.

Where the debtor of a deceased person relies upon a document executed by the deceased as a release from the debt, the executors, unless clearly satisfied on sufficient evidence that a release was intended, are justified in suing the debtor.

An agreement to release a debt when clearly established is a good defence to an action brought by the executors of the creditor for the recovery of the debt from the debtor.

This was an action in which the Board of Executors, as executors in the estate of the late Mr. Van der Poel, sued the defendant for £450 on three promissory notes. The first note was dated September 5, 1891, and was for £100, the second was dated January 18, 1892, and was for £500, while the third was dated April 15, 1893, and was for £250. The plaintiffs sued for the whole of the amount of the first note, and for £150 and £100 on the second and third notes, representing instalments due on them. Provisional sentence had been prayed for upon these notes, but the Court had directed the plaintiffs to go into the principal case.

The defendant's plea was to the effect that on or about April 11, 1896, the said Van der Poel, who was defendant's father-in-law, had given defendant an absolute release from all debts and obligations due by defendant to him, and agreed to give defendant a discharge of all such debts and obligations, and that the notes now sued on were covered by such discharge.

Mr. Schreiner, Q.C. (with whom was Mr. De Waal), for the plaintiffs; Mr. Rose-Innes, Q.C. (with whom was Mr. Buchanan), for the defendants.

Gabriel Daniel Malan, at present residing at Somerset West, said he was married to a daughter of Mr. Van der Poel. Witness and Mr. Van der Poel were for a time partners in a wine merchant's business. They then sold a portion of the business to a Mr. Bosman. That was some years ago. Witness and Mr. Van der Poel carried on business a little longer. Then Mr. Van der

Poel retired, and witness carried on business for a time, but ultimately gave it up and went in for farming. Witness did not know what had become of the books of the partnership. A portion of the books of the firm after Mr. Van der Poel had retired had been burned in October last, but the ledger and some other books were not burned, being in Cape Town. In 1892 Mr Van der Poel rendered an account to witness showing that he (witness) was indebted to him to the extent of £2,593 8s. 8d.; against that there was set a contra account of £827 18s. 8d.

On the document Mr. Van der Poel gave defendant a release from the indebtedness shown in the accounts.

Mr. Innes pointed out that in the account Mr. Van der Poel had taken credit for the £100, the amount of the first note.

The document was in Mr. Van der Poel's hand writing. The reason why witness ceded a policy of insurance on his life for £750 to Mr. Van der Poel was that he had had heavy losses on gold shares and could not pay the amount due to Mr. Van der Poel. At that time witness was indebted to Mr. Bosman as well as to Mr. Van der Poel, and one day when witness, Mr. Van der Poel, and Mr. Bosman were together, they came to an arrangement that witness should insure his life for £750 and cede the policy to Mr. Van der Poel. Some of the premiums were paid by witness and some by Mr. Van der Poel, who was exceedingly kind to witness. On April 15, 1893, Mr. Van der Poel advanced witness more money, £250, on a promissory note. Witness never paid Mr. Van der Poel any interest. He never asked witness to pay any interest. Witness came to Cape Town for a holiday, and saw Mr. Van der Poel at his house at Green Point on April 11, 1896. Witness at that time was not so hard pressed for money, but had not paid any of Mr. Van der Poel's debt. Witness went to see Mr. Van der Poel that day on two matters, one of which was to see him about a promise Van der Poel had made to educate his grandson (witness's son). Witness's wife (Van der Poel's daughter) had died in 1891. Witness also asked Mr. Van der Poel for a release from the debt he owed him. Van der Poel asked witness if he had got the document he had given him in 1893 Witness said yes, and Van der Poel then took and wrote across the document a further agreement to release the witness of all indebtedness to him. Witness was so glad at being released from the debt that he did not notice, until lately, when he got a demand from the executors, that the further agreement was not dated. Mr. Van der Poel died in October last. Witness had paid no interest to Mr. Van der Poel's estate since his death.

Cross-examined: Witness believed that the £100 for which the first note was given was received through the late Mrs. Malan writing to her father for the money. The second might have been given in consequence of witness paying an overdraft at the bank of £500. When witness went to see his father-in-law in April, 1896, he did not say anything about the £500 or the £250. Witness understood that he was released from everything except the £250. Witness had paid the premiums on his life policy once since he got his release. He did so in ignorance. Since then he had not paid the premium, although he had been requested to do so by Mr. Roos. Witness understood from Mr. Van der Poel that he was going to leave the policy to his (witness's) son, but when Mr. Van der Poel's will was read it was found that he had not done so, as witness refused to pay the premium. Witness had told Mr. Hofmeyr at the Board of Executors that he held a release. He could not say whether that was after the institution of these proceedings.

By the Court: At the time the release was written witness and Mr. Van der Poel were in the office at the latter's house at Green Point. Mr. Van der Poel had papers lying about.

Daniel Frederick Bosman, a wine merchant, living in Cape Town, said that in April, 1896, defendant came to Cape Town on a visit, and stayed with him.

By the Court: Defendant told witness that he was going to his father-in-law to get a full release of his indebtedness to him. Witness did not see defendant on his return, and had not an opportunity of hearing whether he got the release.

Examination continued: Witness knew about the ceding of the life policy by defendant to Mr. Van der Poel, that being done on witness's suggestion. His motive for suggesting such a course was that defendant at that time owed witness some £1,200, while he (witness) was indebted to Mr. Van der Poel to the extent of about £6,000, and if defendant were pressed for the money he owed Mr. Van der Poel, it was unlikely that he would pay witness anything, and then in turn witness would be unable to pay Mr. Van der Poel the money he owed. Mr. Van der Poel had a stroke of paralysis before he died. It was after he had had that stroke that defendant went to see him about the release. Defendant had since paid witness the money he owed, having afterwards married and got money that way.

Cross-examined: The document ceding the life policy was in the handwriting of witness's brother, but the business was solely witness's own, his brother having no interest in it.

Johan Enoch Neethling Roos, secretary of the Board of Executors, the executors testamentary of Mr. Van der Poel's estate, said that before Mr. Van der Poel's death witness had the management of his estate, having held his power of attorney since 1894. Mr. Van der Poel, who was a businesslike man, had never told witness that he had released Malan from all indebtedness to his estate. Witness had found no other releases for anyone else. Mr. Van der Poel died on October 24, 1897. Malan came to witness on October 26, 1897, about the inheritance of his son, which, with interest, amounted to £1,530. Under Mr. Van der Poel's will, Mr. Malan's son got £1,500. The other grandchildren (Mr. Scholtz's five sons) were made heirs of the landed and other property in the estate, with the exception of certain legacies. At the meeting witness had with defendant on October 26 last, Mr. Hofmeyr, the chairman of the Board of Executors, was present. Nothing was then said about a release which defendant had from Mr. Van der Poel. On July 26, 1896, during Mr. Van der Poel's lifetime, witness paid the premium on the ceded life policy, and then wrote to defendant demanding repayment. Defendant came to town on August 1, 1896, and said he was sorry he had not paid the premium, but Mr. Van der Poel generally gave him time. He said nothing then about a release. On the second occasion, in October, 1897, witness knew that defendant was in a better position, having made £2,000 on property. Witness mentioned the premium, and defendant said he was not going to pay that. Witness then said to defendant that he understood he had signed some documents in favour of Mr. Van der Poel. Defendant said he had not, and further said that Mr. Van der Poel had never given him an account. Defendant never said anything about a release. After defendant left, witness ransacked some old papers which had belonged to Mr. Van der Poel, and found the notes now sued on. Witness then wrote to defendant, and got a reply from him on November 2, repudiating all liability, and saying that he would be in town in a fortnight to explain. He did come to town in a fortnight, but witness only saw him on the tram car. Witness first heard of the release after the summons had been issued.

By Mr. Justice Buchanan: When witness sued on the notes he did not know of the release.

Cross-examined: Mr. Van der Poel was a precise man of business, kind-hearted, but careful to get what was owing to him. Witness acted for Mr. Van der Poel during the time the instalments on those notes were due, but he never asked witness to collect the interest nor said anything about them. At the time of Mr. Van der Poel's death there were only a couple of mortgage bonds outstanding besides the notes given by defendant. Mr. Van der Poel had been consolidating his property and investing it in Government securities (Treasury Bills) and bank deposits. Witness found the notes sued for among a lot of cancelled transfer deeds. There were no other bills among those notes, except the old bill for £500, which had been discharged by renewal. The £100 note was also among those papers. The share of the estate to be divided among Mr. Scholtz's children would amount to about £11,000. Witness understood that Mr. Scholtz's wife (Mr. Van der Poel's daughter) had never received anything from her father during his lifetime.

Re-examined: The two bonds sued upon were not among the old papers among which witness found the notes. These bonds were handed to witness by Mr. Van der Poel about the beginning of July, 1896, at which time he also received the ceded policy. Witness had collected interest on both those bonds during Mr. Van der Poel's lifetime.

Johan Hendrick Hofmeyr, chairman of the Board of Executors, deposed that on the occasion he and Mr. Roos met the defendant at the Board of Executors, defendant never said anything to him about having a release from Mr. Van der Poel. Witness corroborated Mr. Roos as to what actually took place at that interview.

Cross-examined: That was the only occasion on which witness had ever had a conversation with defendant.

By the Court: At the time of the conversation the bills had not been found. The question as to what action the executors would have taken had the bills been found then, had never been considered by them.

They were never asked for an opinion on that point, and they now left the matter in the hands of the Court.

After argument,

Judgment was given for the defendant.

De Villiers, C.J.: The executors of Van der Poel's estate were quite justified in bringing this action and leaving it to the decision of the Court whether the defendant's claim for release of his debts to the deceased should be allowed. The terms of the alleged release, duly signed by the deceased, are as follows: "I further agree to release the said D. Malan of all indebtedness to me." These words were written across a document by which the deceased had previously released the defendant's debts on condition that he should pay the premium on a certain policy of insurance on his life. A copy of the release with these words written across in the handwriting of the deceased was kept by him. The plaintiff contends that the second release should be confined to the liability to pay the premiums of insurance, but if such had been the intention of the deceased he would have employed very different language. After the original document had been signed the defendant borrowed money from the deceased, for which he gave him promissory notes, and it is upon these notes that the defendant is now sued. He contends that the second release, which was undated but was signed after the date of the promissory note, was intended to release him from the payment of these notes. The terms of the document are wide enough to include the notes, but the point against the defendant is that the notes were not given back to him by the deceased. On the other hand it was proved that other notes of the defendant, which had undoubtedly been paid by him, were also found among the papers of the deceased after his death, The fact then that the notes in suit were in possession of the deceased at the time of his death does not constitute sufficient proof that the second release was not intended to extend to all debts then owing by the defendant. The plaintiff's counsel has rightly contended that such a release, which is equivalent to the *acceptilatio* of the Roman law, should be proved as clearly as a novation of debt, but where the release is in writing the terms of the instrument afford the safest indication of the intention of the parties. It is said that a doubt is raised by the fact that the second release is written across a prior release, and that all the circumstances under which the document was signed should be considered to remove the doubt. The surrounding circumstances in the present case, if they can be allowed to assist the Court, would rather support the probability of a general release being intended. The deceased had a short time before had an apoplectic fit, and knew that by his will he had made much ampler provision for the family of his daughter who was married to Scholtz than he had made for the family of his daughter who was married to the defendant. It seems extremely probable that being now appealed to by the defendant to release the debt of a few hundred pounds he would readily consent. At all events the facts proved in the present case do not, in my opinion, justify the Court in placing a more restricted interpretation upon the document than its terms would reasonably warrant. There was no consideration for the release, but, although not a ground of action, the agreement to release is a good defence to an action for the debt brought by the executors of the creditor. The judgment of the Court must be for the defendant with costs.

Buchanan, J., concurred.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorneys, Messrs. C. J. Berrangé & Son.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice BUCHANAN.]

WARNER V. WARNER. { 1898. March 2nd.

This was an action for divorce brought by Henry William Warner against his wife, Amy Jane Warner, on the ground of her adultery. He also claimed the custody of the children of the marriage. Defendant claimed in reconvention for the custody of the children of the marriage, on the ground that since the marriage the plaintiff had abandoned himself to drunken habits, and was not a fit and proper person to have the custody of the children.

Mr. Buchanan appeared for the plaintiff; Mr. McGregor for the defendant.

Henry William Warner, the plaintiff, said that he was married to defendant on February 18, 1885. There were four children of the marriage, whose ages were six, eight, ten, and twelve years respectively. After his marriage they lived in the Cape district; among other places at Oudekraal. They did not live happily on account of the defendant's abominable temper. He had also at times found her the worse for liquor. Defendant's bad temper showed itself by her threatening him on different occasions with an axe and a knife, and also saying she would poison him. He lived with her until two years ago, when he left her on account of her temper. She had obtained a Magistrate's Court judgment against witness for £1 per week for the support of herself and the children. He paid that up to the time he found out that she had committed adultery. Witness had not cohabited with her since then. She always had a lodger with her, and it was better for witness to clear out. Witness, after he left, travelled about the country. He was a clerk now, but was a gunpowder maker by trade. Last year he returned from Victoria West and wanted to resume living with defendant, but she said she would not live with him, as she had got a lodger. The lodger's name was Collier. He saw defendant about April last year, when she admitted that she had committed adultery. She was *enceinte*, and said it was by a married man, but afterwards admitted that Collier was the man, and she further said that Collier had promised her £100 on the birth of the child. The child was born on November 12, 1897. Witness did not claim the child as his. The birth was registered in the names of witness and defendant. He had not given her anything for her support or the support of the children since he heard about her adultery. He claimed a division of the joint estate. They were married in community of property and defendant brought nothing into the estate. Witness had expectations, an inheritance being just coming due to him. His object in seeking for the custody of the children was to have them educated under the Rev. Canon Peters, at Zonnebloem College, where they would be taught trades. The eldest boy was now a telegraph messenger, and the second worked somewhere in St. George's-street. He did not consider defendant a proper person to have the custody of the children. She was cruel to them at times, and struck them with the first thing that came to her hand. It was not true that he did not contribute to the support of the children when he was away. He had never neglected the children, of whom he was fond.

Cross-examined: Witness had a hasty temper, but not a bad one. When he was away at Darling his wife lived with her brother, and witness sent money for her support. He was keeping a school there, from which he received £3 10s. and the children's school fees, which came to £3 15s. per month. When he returned to Cape Town he and his wife again lived together. He was not aware of the fact that two months after the birth of her first child defendant had to go and work at Garlick's. Witness denied being of drunken habits. He had been drunk while living at Oudekraal, but he did not on that occasion assault his wife. He would be able to send the children to school. He was not in employment at present, but he had prospects of employment. When he was with his uncle, Mr. Warner, of Barrack-street, he got 30s. a week. He denied positively having cohabited with his wife after she confessed to him that she had committed adultery.

William Hill, a private detective carrying on business in Cape Town, said that at the beginning of February last he was engaged by plaintiff to make inquiries into this case. He went to a house in Woodstock, where he saw defendant and Collier, who both admitted that Collier was the father of the defendant's child. Defendant admitted also that she was living with Collier, who was a monumental mason. The children appeared to fairly well clothed for a working-man's children. The house was a decent-looking one, but there was not much furniture in it.

Cross-examined: Defendant did not say anything about not wishing to live in the way she was living.

This closed the case for the plaintiff.

For the defence.

Amy Jane Warner, the defendant, stated that after their marriage she and plaintiff did not live happily together. The night of their marriage her husband was intoxicated, and slept on the floor. At first they lived with plaintiff's mother, and then took a house in the Gardens. Three months before the birth of their first child plaintiff left witness. She had to leave the house because he would not pay the rent, and the furniture was sold to witness's brother, who paid the

£12 owing. Plaintiff used to run away and stay at his aunt's whenever the rent became due. After the birth of her child witness had to go and work at Garlick's, which she did for about a year. After that she went to keep house for her brother, who had now gone to Roodepoort, near Johannesburg. Her husband had gone away up-country. When he came back they lived together again at various parts of the town. Plaintiff drank to excess. Plaintiff had on occasions beaten witness cruelly. After the order from the Magistrate plaintiff paid the £1 per week on two occasions. Then he just gave her now and again a few shillings. Since witness left Garlick's she had supported herself and children by making boys' clothes. Defendant's friends and plaintiff's uncle had assisted her occasionally. She took good care of her children. The two eldest worked, and the two youngest attended St. Mary's School, Woodstock. Before her boys were earning money they were often without food. If they had been earning money then witness would not have gone wrong. She was driven to it. She admitted that she had lived and was still living with Collier, but he was going away.

Cross-examined: All the blame for this unhappy affair attached to plaintiff. She had threatened him on account of his conduct, but never actually took up a knife against him. It was untrue that plaintiff left witness on account of her temper. He ran away whenever the rent became due, or whenever she was about to be confined. When plaintiff returned from Victoria West witness never refused to let him come into the house because she had a boarder. When plaintiff was sober he treated his children well, but when he was drunk he ill-treated them.

Charles Fricker, a commercial traveller, said that for the last nine months he had resided next door to the defendant. On several occasions plaintiff had come to the house drunk and incapable of taking care of himself. Witness had also seen him intoxicated elsewhere as well. Witness saw the children often. They appeared well taken care of. One of the boys worked with witness, looking after his trap and horse while he went inside. Witness taught him how to take orders, and had also in the evening taught the lad bookkeeping.

Cross-examined: Witness had once seen Collier drunk. He had never seen defendant the worse for liquor, although she was not a teetotaller.

Robert Thomas Jearing, the father of the defendant, gave evidence as to the plaintiff leaving his wife at different times. Plaintiff drank a good deal. He did not mind quality but went in for quantity, and drank lots of young wine. Witness had often had to assist the family. The children were now well treated by their mother.

Cross-examined: Defendant might take a small drop of liquor, but witness had never seen her drunk.

Plaintiff's counsel said that his client had £220 coming due to him, and expectations of more after the settlement of some dispute regarding some property. He was willing to put all the money remaining after the payment of the costs in the present action in the Guardians' Fund, for the support of the children at some boarding-school.

After argument,

De Villiers, C.J.: This is an extremely difficult case to deal with, because it appears that both parties have shown by their conduct that they are not the best of persons to have charge of children. At the same time, the defendant has been guilty of a breach of conjugal duty. Her adultery has been clearly proved, and the plaintiff is therefore entitled to a decree of divorce, and the defendant has forfeited all right to benefit by virtue of the joint estate. The difficulty arises as to what is to be done with the children. Of course, it is the interests of the children which should be considered by the Court in the first instance, and it is certainly to their interests that they should receive a further education, such as the father says he wishes to give them. It seems he is getting some money which he would be able to devote to that purpose. That money amounts to £220, out of which will have to be paid the costs of this action; but he expects to receive some more money in respect of property not yet sold. Perhaps it would be as well that the children should not be hurried away from their mother at once, and that some time should be given until the plaintiff has the money in hand to pay into the Guardians, Fund. As to the youngest child, I think that one had better remain in the mother's custody until a further order of Court. The plaintiff can apply again after some time if he wishes to do so. The judgment will therefore be: Decree of divorce, a declaration that defendant has forfeited all rights arising out of the community of property; plaintiff to have the custody of the three elder children, on condition that before claiming such custody he pays into the hands of the Master of the Supreme Court the sum of £200, to be devoted to paying the school expenses of the said children; defendant to have access to the children and the right to apply to the Court for custody: defendant to retain custody of the youngest child until a further order of Court.

Buchanan, J., concurred.

There was no order as to costs.

[Plaintiff's Attorney, D. Tennant: Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

Re THE INSOLVENT ESTATE OF VAN WYK. 1898. March 2nd.

Removal of trustees.

Mr. McGregor applied, on the petition of C. J. C. de Jager, for an order of Court for the removal of Julius Ascher and Willem Bernard te Brugge from their office as trustees in the insolvent estate of W. J. van Wyk, farmer, and for a meeting of the creditors in that estate to be called for the purpose of appointing trustees for the purpose of passing transfer of a farm in the said estate, also for an order authorising the Civil Commissioner to accept a declaration of purchaser and seller in connection therewith, under section 52 of the Ordinance.

The petition set forth that the estate of W. J. van Wyk was surrendered as insolvent in 1882, and certain portions of the farm Vergelegen were bought by certain parties for £1,250 and £130 respectively, but they being unable to find security the petitioner bought the farm from the trustees in the insolvent estate (Julius Ascher and Willem Bernard te Brugge) for £1,380. He had been in possession of the farm since then, and had paid taxes thereon from that time. The amount (£1,380) which he paid was also brought up in the liquidation account. He gave Julius Ascher the money to get transfer effected, but had discovered that that had not been done. Ascher was supposed to have left the country and Te Brugge's whereabouts was also unknown.

The Court granted a rule calling upon Julius Ascher and Willem Bernard te Brugge to show cause by March 12 why they should not be removed from their trust. This rule to be published in the "Government Gazette" and the "Oudtshoorn Courant" at once.

Postea (March 12).

The rule was made absolute and an order given authorising the Master to call a special meeting of creditors in the estate.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN and a Jury.]

BERRANGE V. METROPOLITAN AND SUBURBAN RAILWAY COMPANY. 1898. March 3rd.

This was an action in which Mr. D. F. Berrangé, attorney, Cape Town, sued the Metropolitan and Suburban Railway Company for the sum of £3,000 damages for injuries which he sustained on the line of the defendant company on the 21st June.

Mr. Graham (with him Mr. McGregor) appeared for the plaintiff, and Mr. Close (with him Mr. Currey) for the defendant company.

The plaintiff said, he resided at Sea Point. In June last he held a monthly railway ticket from the defendant company. On the 21st June he left Cape Town for Sea Point, and afterwards returned to town by a train leaving Sea Point at 1·40 p.m. This train, as far as he could remember, had always crossed the Cape Town train at Three Anchor Bay. On this occasion the train in which he travelled did not come to a dead stop. Before the train stopped there was a crash, and he found himself pinned to his seat by the carriage being telescoped. (Photographs of the train were put in.) Both his legs were broken. A gentleman who was in the carriage with him chopped away the woodwork, and he was lifted out. The bone of his right leg stuck through his trousers in several places. The left leg was broken close to the ankle. He was taken to the Somerset Hospital. For nine days it was expected that they would have to amputate his right leg. He was in bed from the 21st June to the 17th September, and he left the hospital on the 4th October. He suffered most agonising pains. For the first eight or ten days he did not get a wink of sleep. He lost a great quantity of blood. He could not move about without crutches even yet. He was a widower with nine children. Approximately his income from his profession was £80 to £100 a month. Whilst he was in hospital most of his business was done by his chief clerk, but for about five weeks his business was without a properly qualified man.

By His Lordship: It was very difficult to say how much he had lost in his business in consequence of the accident, but he had lost considerably.

Witness further stated that he had to drive into town and back again in cabs. Approximately cabs cost him 10s. a day During the time he was in the hospital he had no communications with the directors of the defendant company, and no offer was made to him. There was not even an expression of sympathy.

His Lordship: A company never has a conscience. It has no body to be kicked nor a soul to be saved.

Witness stated that during the time he was in hospital the stationmaster of the Cape Town terminus came to see him, and told him that on the day of the accident the cap had been taken off the vacuum brake, and that this had been done twice before. The railway staff were greatly undermanned. He had never seen a porter on the line. In some cases a boy of ten or twelve acted as stationmaster. At night, if passengers desired to defraud the company, they could easily do so as there was no one to take the tickets. Sometimes the guards had to run after passengers to get their tickets. He paid the New Somerset Hospital £53 and £6 10s. for a wheel chair. He had been treated in his own house by three doctors since October, and he would have to pay them.

In cross-examination: He was very glad that he was not a shareholder in the defendant company. He could not bind himself to state how much he lost in his business during the time he was away. There was some business done in his office during the time he was away. He could not say whether his loss was 50 per cent. or 75, or even 100. He was a director of Van Ryn's Company, and he drew about £100 a year from that source. He had lost about £50 from this account alone in consequence of the accident. Under the care of the doctors he was now improving, but he was nothing like the man he was prior to the accident. There was nothing unusual in the speed of the train before the accident occurred. Some of the trains went far too fast. The 1.40 from Sea Point was the lunch train, and business men were anxious to get back to town, but not at the risk of their lives.

Dr. Charles Anderson, resident medical officer at the New Somerset Hospital, said he remembered Mr. Berrangé being brought to the hospital on June 21. He then proceeded to describe his injuries. Mr. Berrangé had sustained permanent injury to the ankle and toes. In six months he might be able to go without crutches, and he would probably be able to ride a horse in time.

Mr. Graham: Will he be able to bike?

Witness: I think he may.

Witness said Mr. Berrangé would never be the same man again. He would never be able to walk or ride fast, in consequence of the permanent stiffness of the ankle and toes, and he would always have a limp.

Henry Thomas Standen, who accompanied plaintiff on the day of the accident, corroborated the plaintiff's evidence.

Dr. C. C. Elliott said on the 21st June he was acting resident surgeon at New Somerset Hospital. He examined the plaintiff. Both bones of the right leg were broken, and protruding through the skin. There were also some wounds and bruises on the legs. Plaintiff was in a very excitable condition owing to the shock. He was very severely injured. For a week or ten days they had great doubts as to whether the right leg should be amputated. The injuries gave them a great deal of trouble. They had to burn the wounds with nitrate of silver on two occasions, and they grafted some skin on to his leg. He was in a good state of health when he was admitted to the hospital, and that helped him to pull through. Since plaintiff left the hospital he had been in consultation with Dr. Fismer seven or eight times, and he generally charged a guinea each consultation. In five or six months plaintiff might be able to do without his crutches, but it might possibly be longer.

In cross-examination: Plaintiff might be able to ride a horse, but he would strongly advise him not to try to ride a bicycle. He did not think the insurance company would increase the plaintiff's premium.

Dr. F. Fismer said he had been the plaintiff's medical attendant for several years. He saw him at the hospital several times, and had attended him regularly since he left the hospital. Up to date his fees would be from £35 to £40, and he would have to continue attendance. The injuries received were very serious. He did not think he would ever be able to walk perfectly.

In cross-examination: Plaintiff would be able to walk fairly well, but perhaps he would never be able to get upstairs.

Mr. Graham then closed the plaintiff's case, on the condition that he might be allowed to call rebutting evidence on the question of negligence.

For the defence,

Frederick Thomas Tester said for several years he had been an engine-driver in the employ of the defendant company. He held a qualifying certificate. On the 21st June he was driving the 1.40 train from Cape Town. A model of the vacuum brake was put in, and witness explained its working. Before leaving each terminus it was the driver's duty to test the brake. There was nothing wrong with the brake on the 1.40train from Cape Town on the 21st June. The brake worked all right at Varney's Corner. He slackened speed about 200 yards before reaching the facing points at Three Anchor Bay. He had instructions to drop from eighteen to twenty miles an hour to four miles at this point. When he applied the vacuum brake he found it would not act. He then told the fireman to put on the handbrake, reverse the engine, and blow the bass whistle to warn the guard to apply the brake. He could do nothing more. When he reached the platform he was going at about six miles an hour. Just then he saw the Sea Point train coming on, and he tried to warn the driver by waving his arm. He remained on the engine until they touched, and then he stepped off. He thought it was time to look after himself when the collision took place. Half a minute afterwards he jumped on the engine again to shut off steam. The fireman stuck to the engine all the time holding the brake. He would swear that he was not driving too fast as he approached the facings.

In cross-examination: They depended entirely on the vacuum, but they had two hand-brakes. If they were going slowly they could stop the train by these hand-brakes. The hand-brakes were always used to stop at every station. The vacuum had never failed with him before.

The guard of the 1.40 train from Cape Town corroborated Tester's evidence.

William Turner, the engine-driver of the 1.40 train from Sea Point, said as soon as he saw the Cape Town train ahead he tried to stop his train. He remained on his train until they were a yard or two from meeting the other train, and then he jumped off, but immediately jumped back to shut off steam. At the time of the collision his train was going at from one to two miles an hour. The fireman stuck to the train until he was knocked off.

Cross-examined: He could not say how fast the Cape Town train was travelling at the time of the collision. If there had been a danger signal at the curve the collision might have been avoided, because that would have prevented him rounding the curve.

Robert Jurd, fireman with last-named witness, corroborated his evidence.

Cross-examined: The Cape Town train was going about four or five miles an hour when they struck. No regulations had been given to the employés of the company.

Frederick Brindley said he had been in the Government service as driver and fireman for eleven years, and had been with the defendant company for five years. His duty was to see that the engines and rolling-stock were kept in perfect order. He inspected everything twice a week, with a thorough overhauling on Sundays. He had inspected everything on the day before the collision, and on the morning of the accident he made a thorough inspection of the brake gear, and made four trips on one engine. They had extra inspections in view of the Jubilee holiday traffic. Everything was in perfect order. After the accident he inspected the train. Anyone jumping off the train and swinging off by the vacuum brake could put it out of gear.

Cross-examined: He knew of a previous case where the top of the vacuum brake had been removed. He could not say how it had been removed. Judging from the effects of the accident, he would think the two trains were going at about six or seven miles an hour; that was one going at five and the other two. The Government had given up the simple vacuum since the collision on the Sea Point line. The defendant company had not given it up. He did not insert an advertisement in the "Cape Times" offering £100 reward for the discovery of the person who removed the top of the vacuum brake.

Wm. T. C. Perkin, civil engineer, said he had prepared the plan put in from actual survey. On such a line as the Sea Point, he would think the vacuum brake quite sufficient. The working of the line appeared to him to be all that was required.

Cross-examined: He did not think it would have been possible to have stopped the trains with the hand-brake. A train going down the hill at eighteen miles an hour could not be pulled up by the hand-brake in less than 600 yards.

Henry Rowse, first-class master gunner at Three Anchor Bay, said he was sitting in his house, about ten yards from the line, when he heard a peculiar whistle. At that time the Cape Town train was going at five or six miles an hour.

H. H. R. Smuts said he was an old season ticket-holder with the defendant company, but he was not a shareholder. He was on the Cape Town train on the 21st February. After hearing the danger whistle, he felt that the train was being pulled up. Previous to that they had been going at a good speed.

John Walker, manager of the defendant company, said that special instructions to the drivers were conveyed through Mr. Brindley, and the drivers were qualified at Salt River. The drivers were not pressed for time, but the average time was fifteen or twenty minutes from Cape Town to Sea Point. They had done everything imposed by their Act of Parliament to safeguard their passengers.

Cross-examined: The guards had not to pass any examination, but he put some questions to them. He ordered the advertisement to be put in the "Cape Times" because he was certain of the cause of the accident. The Government on Monday last took over a quantity of rolling-stock, but he could not say how much they paid for it.

Matthew Brown, head of the carriage works at Salt River, said that at present the goods trains in the Government service were worked by the simple vacuum, and it was in vogue on the suburban line up to August last year. It would be quite easy for a passenger to take the top off the vacuum brake when jumping off the train.

By a juror: It would not be possible for the top of the vacuum brake to shake off. He would not like to say whether the brake could be knocked out by the force of the collision.

Samuel Waymer, in charge of the Drawing Office at Salt River, said he knew all about brakes. He never knew of a case where the coupling at the end of the train had been detached accidentally. He did not think a train going at eighteen miles an hour could be stopped by the hand-brakes within 460 yards.

Abraham Difford, Traffic Manager of the Cape Government Railways, said probably the speed was about ten miles an hour when the collision occurred. If the vacuum-brake had worked it would have been safe to have gone down the decline at eighteen or twenty miles an hour. He did not consider the simple vacuum-brake a good one.

This closed the case.

After Mr. Graham and Mr. Close had addressed the jury, His Lordship summed up and the jury awarded the plaintiff £2,000 with costs.

[Plaintiff's Attorneys, Messrs. C. J. Berrangé & Son: Defendant's Attorney, Gus. Trollip.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice BUCHANAN.]

FENNY AND HOLDSWORTH v. WILKINSON. { 1898. March 4th .. 7th.

This was an action for the recovery of the balance of account for certain work done and material supplied by plaintiffs, who are painters and paperhangers, for defendant who is a builder and contractor. The balance remaining, which was sued for, amounted to £76 6s. 3d. The defendant, in his plea admitted certain items, but stated that £94 had been overpaid on the account, which more than covered those. With regard to other items, it was contended that the work had not been satisfactorily performed, and defendant had had to have them done over again, while plaintiffs neglected to perform other parts of the work they had contracted to do.

Mr. Innes, Q.C. (with whom was Mr. Gardiner), for the plaintiffs: Mr. Schreiner, Q.C. (with whom was Mr. Buchanan), for the defendant.

Paul Fenny, one of the plaintiffs, stated that last year his firm did several jobs for defendant. In April last year, they undertook the painting, &c., of Mr. Brown's house on specifications submitted by defendant, for £40. Some extra work was done, for which a fair price was charged. In one case witness had to put on a colouring of lime and copperas, as specified, but pointed out to the defendant that it was a cheap kind of job. The latter said they must adhere to the specifications. They grained and varnished the woodwork of a lean-to instead of only staining it, as provided in the specifications, and made no extra charge for that. The work took about six months off and on, instead of three weeks, owing to the carpenters being behind. It was not possible to do proper clean work with carpenters working at the same time in the house. The painting generally was properly and well done. The reason the architect would not pass the work after it was finished was that certain alterations had to be made to the woodwork, and the carpenters had to go about witness's work before it was finished, and so injured it. Witness tried to rectify those things as well as could be done. The quality of the woodwork of the ceiling was not as good as the woodwork witness generally coloured. They first heard complaints about their work after they started the present action, although they had heard complaints with regard to the woodwork. Defendant had never made any formal complaint to witness with regard to his work. There was some work in the contract which they could not get done owing to the carpenters being behind, and which witness could not get done afterwards owing to Mr. Brown refusing them entry into the house. The work undone would not cost more than £2 10s. On August 16, 1897, witness's firm tendered for the painting, &c., of the Industrial Home (£26). They never inspected the original specifications, although they saw them in defendant's hand. Witness went round, and defendant pointed out the work required to be done. It was on defendant's instruction that they tendered for two coats instead of three, as in the original specifications. To do good work there ought to have been three coats. They did all the work they tendered for. Witness thought the staircase was painted by his men, but could not say positively, as it was not fixed the last time witness was on the job. With regard to the Adderley-street Dutch Reformed Church, plaintiffs did the colouring according to the specifications of the defendant. They contracted to do the work for £13, but owing to the woodwork not being fixed before the action was commenced, they had not finished there, and therefore charged £8 only for work done. With regard to the estimate for Mr. Malan's cottages (56), they saw no specifications, but arrived at the measurements, so many superficial yards, from what defendant told them. They did the work actually tendered for accurately and well, putting on the requisite number of coats and using good material. An extra coat was put on on defendant's instructions, for which an extra charge was made. There was also an extra charge for extra work that was not included in defendant's measurements The sizing was also an extra, it being found absolutely necessary to use size to make the paper stick to the wall. The architect specially asked for the walls to be sized, and defendant told witness to do it. Defendant asked Mr. Malan at the top of the staircase if he was satisfied with the work, and he said, "Yes, I am perfectly satisfied." Witness did all the extra work he was asked to do with the exception of the staircase, and some other work which defendant wanted plaintiff to do, but for which he would not pay extra.

Cross-examined: Either witness or his partner was present every day when the work was being done, with the exception perhaps of the last few days. Witness never saw Mr. Reid's report condemning the quality of the work at Brown's house. They did no rubbing down. Alterations had been made to the ceiling, but not on account of witness's work. With regard to the Industrial Home their work had not had to be done over. Witness regarded "priming" as a coat of paint. All painters did the same. Witness never saw the specifications or plans of Malan's cottages. Defendant was a most difficult man to deal with.

Albert Holdsworth, the other plaintiff, corroborated generally his partner's evidence. Defendant told witness on one occasion that Mr. Reid, the architect, had made some complaint with regard to Brown's house. He told witness what Mr. Reid objected to, but never showed him the report. The labour alone for the painting work came to: at Brown's house, £35 10s. 3d.; Industrial Home, £18; Malan's Cottages, £53 16s.; Dutch Reformed Church, £4 7s. 3d.

Cross-examined: Witness never saw the plans or specifications of Malan's cottages. He only received the note from his partner with the measurements. Out of the amount which he had said labour had cost at the Industrial Home, £3 18s. was for material.

Robert Esdon, an architect and engineer, stated that on one occasion he had occasion to inspect the work the plaintiffs were doing at Brown's house, and afterwards gave them the job of painting a house witness was building for Dr. Wood. They did the work better at witness's house, because they had a better chance, the carpentering work being good. Witness had seen plaintiffs' work at Malan's cottages. The work was fairly good for contract work. With regard to priming, witness had always looked upon that as a coat of paint—the first coat.

David Arnott, clerk of works to Mr. Parker, the architect, said he had been at the business for twenty-seven years. Priming was really the first coat of paint. According to witness's experience, four coats of paint would mean that the wood would be covered four times with paint, including the priming. He had seen the plaintiffs' work at Mr. Malan's houses, and considered it a fair, decent job. He did not consider that the carpentering work was good. The painting was good for that class of work. In fact the painters could not help themselves.

Cross-examined: If a painter estimated for a job he would never consider that he would have to size the walls.

Frederick White, builder and contractor, stated that he was at Malan's cottages several times, and saw the plaintiffs working there. He considered it fair good work. Witness had also been at the Industrial Home on Wednesday, and saw plaintiffs' work there, which he considered a really first-class job. He had measured the internal painting at Malan's cottages, and found that woodwork and walls totalled 1,124 yards. He made the measurements personally.

Cross-examined: Witness could only give the lump figure. He did not think it necessary to keep the details.

Arthur Handsley, a painter in the employ of plaintiffs, said he worked for them at Malan's cottages, and did a little for them also at Mr. Brown's house and at the Industrial Home. At Malan's four coats were put on all the work. When the work was nearly completed witness heard defendant tell plaintiff that the architect had said that he would not pass the work, but that if Mr. Malan was satisfied it would be all right. Afterwards witness heard Mr. Malan tell plaintiffs, in the presence of defendant, that the work was satisfactory to him.

Harry E. Tennant, a master painter in Cape Town, said he had had many years' experience. He had examined the painting work at Mr. Malan's that morning, and considered it very creditable indeed. The carpentering work was bad. Witness, from the general appearance of the work, thought four coats of paint had been given.

Cross-examined: Witness would judge that good material had been used.

This closed the case for the plaintiffs.

For the defence.

Arthur Henry Reid, an architect and civil engineer, carrying on business in Cape Town, said that under a power of attorney from his brother he took over the completion of Mr. Brown's house. At the time he took it over very little painting work had been done. Witness as architect, did not know plaintiffs in the matter, recognising only defendant as the contractor. On October 20 witness made a report reflecting adversely on the contractor's work, which had since been taken out of his hands, but not on witness's recommendation. In addition to his objections to the carpentering work, witness made a number of objections to the manner in which the painting had been done. He adhered to that report, and contradicted the evidence of the plaintiffs on certain points. The report was not exaggerated, and witness did not think he had been too exacting. After the contract was taken out of defendant's hands the whole of the painting work had to be rubbed down, and two new coats of paint given. The rough grain in the wood had had to be smoothed down. It cost £22 3s. 4d. to make good the defective work, and £11 10s. was also paid for work which the plaintiffs neglected to do, The bad carpentry had a good deal to do with the painting work. Out of the £22 paid for defective painting work quite £15 was due to the defective carpentry. That made £18 due to the defective painting, and that which was omitted to be done by plaintiffs. Witness considered that £40 was too low an estimate for the work. Witness considered what plaintiffs had done to the lean-to of no value, as it had to be done over again. With regard to Mr. Malan's house, witness had not passed the painting there. He did not consider it a good job, the ceilings in particular being disgracefully done. Witness, counting the prime, claimed one more coat of paint for the inside and two more for the outside. Witness judged from his own experience, but had not actually seen the coats put on. He controverted Mr. Tennant's evidence as to the painting being a good job. Witness objected to the woodwork, and cautioned the painters before they started, telling them that if they put any paint on the ceiling or other woodwork they would do so at their own risk. Defendant had done painting work to the value of £10 to Malan's cottages after plaintiffs left. £23 17s. 10d. would be a reasonable figure to finish the work left undone at Malan's.

Cross-examined : Witness did not consider that the painting had been done under favourable circumstances. In the lean-to the ceiling boards ought in some cases to have been replaned. It did not give the painters a fair chance. In other ways the painting had been injured by hinges, &c., being taken off and put on again. Witness did not think the staircase at Malan's would be included in the internal work. In the ordinary course the back doors, &c., would be included in the external work. When witness spoke of only two coats having been given he did not include the priming as a coat of paint. If the work plaintiffs had done at Malan's had been properly done it would have been worth about £45.

Johannes Albertus Vixseboxse, an architect, carrying on business in Cape Town, said he supervised the work in connection with the Industrial Home and the Dutch Reformed Church. The painting at the former place was not done to his satisfaction, nor in witness's opinion according to the specifications. Witness had insisted on the contractor, Mr. Wilkinson, doing part of it over again. Plaintiffs had left some of the work undone, which had since cost £8 6s. 6d. to finish. With regard to the Dutch Reformed Church, the work done there by the plaintiffs was simply the colouring of the arch. That had not been done satisfactorily, as the brush marks could still be seen. Witness had written a letter to the contractor, Mr. Wilkinson, demanding that it should be put right.

Cross-examined : Considering the workmanship, the work plaintiffs had already done to the arch would be worth about £5.

George Wilkinson, the defendant, a builder and contractor carrying on business in Cape Town, stated with regard to the painting work at Mr. Brown's house that plaintiffs saw the specifications and tendered thereon. Witness admitted that the lean-to and dado would be extras. Witness had had no settlement with Mr. Brown. Objection had been taken to the carpentering work. Witness was not satisfied with the painting work performed by plaintiffs. He was positive that he told Fenny about Mr. Reid's adverse report. Mr. Reid's objections to the painting were just. Witness admitted that there was also some little thing wrong with the carpenter's work which had been put right as far as possible. Witness had a capable foreman on the job. He corroborated Mr. Reid as to the defective and omitted work at Mr. Brown's house. The work at Malan's had not yet been finished nor paid for. Witness never told Fenny that Mr. Reid was not satisfied, but that he must go on all the same. Since plaintiffs left witness had had to do work to the value of £10 19s. 6d. at Malan's, which fell within the £56 contract. Fenny did see the specifications, quantities, and plans for Malan's, and had made his estimate from them. Witness admitted some extra work plaintiffs had done there. Witness had overpaid them £97, which would more than cover extras. Another painter had tendered for £23 17s. 10d. to complete the work left undone by the plaintiffs. Witness corroborated Mr. Reid as to the insufficiency of the work done. It cost witness £8 6s. 6d. to complete the work plaintiffs had left undone at the Industrial Home. Witness was willing to allow the difference between that sum and the tender of £26. The colouring of the arch at the Dutch Reformed Church had not been done satisfactorily. Witness had had to call for tenders to get the work done again, and had accepted one for £22 11s. 9d. That included £8 odd for the erection of a scaffolding now necessary through the organ being fitted up. Witness's position was that he had paid plaintiffs £243, which fully covered all the work they had done.

Cross-examined: He had been in this country six years, and plaintiffs had done a good deal of work for him during the past twelve months. Witness did not think the tenders were too low ; he had lower tenders. During the progress of the work at Mr. Brown's witness spoke to the plaintiffs about the bad staining of the ceilings and the bad painting generally. At Malan's he complained about the painting of the ceilings, and that work was done over again. During the time the work was going on witness made payments to plaintiffs on account of work done. Accounts were not rendered to witness. and he paid plaintiffs according to what they thought they were entitled to. Witness denied that the carpentering work was badly done. Everything that was done wrong was put right, and on the whole it was a good job. With regard to Mr. Malan's, Mr. Reid had told witness, but not until the priming had been put on, that the carpentry work was bad, and witness had the paint sandpapered off. Witness contended that it was the bad painting that made the carpentry look bad. There was no extra coat ordered. nor had one been put on. Mr. Reid did not point out to witness the dirty state of the ceilings at Mr. Brown's house before they were painted. The ceiling boards were put on before the plastering was begun and a little plaster had got on the boards. The painting work at Mr. Brown's house was nearly completed when Mr. Reid made his report. Witness read the portions of the report relating to the painting to the plaintiffs. Witness denied the statements of plaintiffs as to the conversation with Mr. Malan. On the occasion referred to they only spoke about the colours, with which Mr. Malan expressed himself satisfied.

Re-examined: Witness was quite certain plaintiffs did not put on the number of coats of paint at Malan's mentioned in their letter.

Edward Bernard Larkin, painter and decorator, said that he knew Messrs. Drake & Avery, and remembered them being engaged by Mr. Reid to finish some painting at Mr. Brown's. Witness did that work for them. He saw the work done by the previous painters. It was what he called miserably done. being very rough for the want of labour put on it in the way of sandpaper. It would be the work of a painter to sandpaper and fill up the dents and stop the nail holes. That applied to the doors and facings. It was not the rule to fill up and stop ceilings. Ceiling boards were used as they came from the mill, and were often defaced and dirty. The dirt was generally cleaned off by the painters. Witness had to do plaintiff's work over again. That cost £36 3s. 9d. for labour, and £8 14s. for material: but witness, instead of repainting the ceilings, covered them with canvas, which was then papered. To repaint the ceilings would have cost £5. The paper put on the walls by plaintiffs was loose, and dirty and patched in places: but witness had little to do with that.

Cross-examined: The job was worth between £70 and £80, and the work done by plaintiffs was worth £40. Five rooms were covered with canvas and papered. Canvas made a better job.

Re-examined: If witness had tendered for the job he would have tendered to do it for £70 or £80, but he would do it in first-class style.

By the Court: As far as witness knew, the carpentry work was all right, but he did not look very particularly at the ceilings, because he was going to cover them all.

Isaac Ottewell, painter and decorator, said he inspected plaintiffs' work at the Industrial Home, and came to the conclusion that it was very badly done. The work witness had done at Mr. Brown's cost £7 6s. 6d., and defendant had also done £1 worth of work in priming. About the beginning of February witness inspected the plaintiffs' work at Malan's. Afterwards he was asked to make a tender, and took out quantities. He found that the total amount of work was 1,192 yards—956 yards internal and 236 yards external. The work of the plaintiffs at Malan's had not been properly finished, and the paint used must have been of a very inferior quality, knots being seen through it. Judging from the appearance four coats of paint had not been given, even including the priming. Witness had sent in a tender for £23 17s. 10d. for the work to be done. He could not do it cheaper.

Cross-examined: Witness was careful about taking out his quantities at Malan's, and if the quantities of the architect showed 1,226 yards, the architect must be wrong. Witness was confident that his judgment as to the number of coats of paint was correct.

John Lee, painter and decorator, said that he gave a tender for the work at the Dutch Reformed Church of £22 11s. 9d., of which £1 10s. would be for work which plaintiffs' contract would not cover. The work done by plaintiffs on the archway was bad, the brushmarks showing. £8 15s. 6d. was a fair price for the scaffolding required to do plaintiffs' work on the archway over again. Witness had done work to the value of £10 9s. 6d. at Malan's, including six backdoors and a staircase. After witness had done that he looked over the work done by the plaintiffs. It was very bad work. Witness could not swear to the number of coats of paint, but four coats always made a good job, which that was not. Witness could not offer any opinion about the material. The painting work was not done so that it could be passed.

Cross-examined: The recolouring of the archway in the Dutch Reformed Church could be done now with a ladder, but not well. The cause of plaintiffs' bad work there was the want of scaffolding. The work done was of some value because it laid a foundation.

Re-examined: The organ had now been fixed in; and it was necessary to protect it, Richard Edward Wood, clerk of works, said that at the beginning of February he examined plaintiffs' work at Malan's. The external work was in a bad condition, and proper material had not been used. The internal work was in the same condition. Four coats of paint could not have been applied. It was not work that an architect could pass. Since last Friday he had visited the houses, but had not had time to take measurements. He thought, however, that the quantities fully covered the work done.

Cross-examined: It was not the class of work witness had been accustomed to, he having been engaged on large buildings, such as those of the Castle Company and new hotels. Witness's standard was a high one, and paid for accordingly.

This closed the case for the defence.

After argument,

De Villiers, C.J.: The best way to deal with this action is to take the total amount, £318 7s., which plaintiffs claim and deduct from that the total amount of so many items as in the opinion of the Court the plaintiffs are not entitled to recover, and also the amount defendant has already paid to plaintiffs. With regard, first, to the item No. 6, the Dutch Reformed Church, that should be reduced by £2. We come next to the work done at Mr. Brown's house. I am satisfied from the evidence that the real cause of the somewhat slovenly work which was done to those houses was owing to defendant's bad carpentry. The evidence given on behalf of the plaintiffs leaves no doubt in my mind that defendant's work had been somewhat scamped, and that it was in consequence of that scamped work that the plaintiffs could not do better painting than they had actually done. There was some conflict of evidence on that point, but on the whole the evidence went to show that that was so. Then the plaintiffs were unable to complete the work, because, through no fault on their part, the matter was entirely taken out of their hands. I think, however, that from this amount of £40 there might fairly be deducted the sum of £11, which Mr. Reid swears had to be paid in order to complete the work. That gives a very liberal allowance to defendant. The plaintiffs' own evidence is that the work could be done for £3, but the better test is what was actually paid for the purpose of doing the work which the plaintiffs had not done. I think, therefore, that from this amount of £40 must be deducted the sum of £11. The next deduction would be the £2 10s. which is admitted. Then the Court comes to the Industrial Home. With regard to that I think it seems to be common cause that £8 6s. 6d. is the amount that should be deducted. Then we come to the Dutch Reformed Church in Adderley-street, with regard to plaintiffs' claim for £8. While the work there is admittedly not completed, what the plaintiffs say is that the tender was for a larger amount, but they were unable to finish the work because the woodwork was not ready. In the correspondence, however, which ensued on this point the plaintiffs insist upon being paid, and we do not find in the correspondence any offer on the part of the plaintiffs to do the work as soon as the woodwork was ready. It is only fair to the defendant that this item of £8 should be deducted altogether, the plaintiffs never having, except in the replication when it was too late, offered to do the work, and they could not well recover anything before they had completed that work. There was no time limit, defendant not being bound in any fixed time to have the woodwork ready, and therefore the Court considers that this £8 can well be omitted. We come next to the item, Malan's Villas. Mr. Schreiner has now candidly admitted that it is not the specifications that should be looked to, but the letter that was written by the plaintiffs offering to do the work. In my mind that work has been done according to the contract. There are no doubt many witnesses who will say that the work has not been perfectly done, but in my opinion the evidence on behalf of the plaintiffs that this work was properly done is more reliable. From the amount claimed, however, we are of opinion that there ought to be deducted the sum of £10 11s. in regard to the extra 211 superficial yards. The evidence on that point seems to be very loose concerning the measurements that were made to show the extra 211 yards. On the other hand a very intelligent witness called on behalf of the defence, Mr. Ottewell, said that the superficial yards of work done did not exceed the amount contracted for. On the whole, therefore, I think that £10 11s. must be deducted. Then there is the £4 for sizing which must also be deducted. With regard to the £10 12s. 6d., we had some doubt, but the plaintiffs' evidence is very conclusive. For the defence it was simply said that they had seen the work when done and not before, and on the other side the plaintiffs themselves who did the work were quite positive that the requisite number of coats had been given. I am not inclined to disbelieve the positive statement of the plaintiffs given on oath because of the mere theoretical evidence given on behalf of the defendant that the proper number of coats had not been given. This £10 12s. 6d. is stated by the plaintiffs to be for an additional coat of paint in addition to those mentioned in the contract, and it is impossible for the Court, after the manner in which the plaintiffs gave their evidence, to hold that it was wholly untrue and that the extra coat did not go on. The deductions to be made are therefore £2, £11, £2 10s., £8 6s. 6d., £8, £10 11s., and £4, making a total of £46 7s. 6d., and leaving £29 19s. 6d. still due to plaintiffs. Judgment will therefore be for the plaintiffs for £29s. 19s. 6d. and costs.

Buchanan, J., concurred.

[Plaintiff's Attorneys, Messrs. J. & H. Reid & Nephew; Defendant's Attorneys, C. C. Silberbauer.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and Hon. Mr. Justice BUCHANAN.]

REHABILITATIONS.

{ 1898. March 8th.

Mr. Maskew applied for the rehabilitation of the estate of Johannes Stephanus Grove. It was shown that the insolvent had not kept any books.

The application was refused, with leave to make a fresh application in twelve months.

The Chief Justice stated that the insolvent could give very little explanation as to the state of his affairs, and the only thing he could say in his favour was that there had been no prosecution.

Mr. Close applied for the rehabilitation of the estate of Gideon Jozua Malherbe, and stated that the application had been made before and refused, with leave to apply again in six months. That period had now elapsed.

The application was granted.

Mr. McGregor applied for the rehabilitation of Wm. Augustine Hampson, of King William's Town.

The application was granted.

Mr. Currey applied for the rehabilitation of Daniel Hendrick Viljoen.

Granted.

GENERAL MOTIONS.

Ex parte DIVISIONAL COUNCIL OF ALBERT.

Mr. Gardiner applied for a rule *nisi*, granted under the Derelict Lands Act, to be made absolute.

The application was granted.

IN THE MATTER OF THE PETITION OF AN ATTORNEY.

Mr. Innes, Q.C., applied for an order permitting petitioner to practise as an attorney-at-law and notary public. The petitioner had been suspended from practice on the 22nd November, 1894, for three years at least, and until a further order of Court should be made. Affidavits were read to show that his conduct had been exemplary since the suspension. Mr. Innes was proceeding to quote authorities, when

The Chief Justice said: That is sufficient. I think the applicant has sufficiently atoned for his crime.

The application was granted.

Ex parte MARTIN JOHN JOSEPH BEIN.

This was an application for the cancellation of a mortgage bond.

Mr. Maskew applied, and stated that the matter was before the Court on the 12th October last, when their lordships desired further information respecting the whereabouts of the mortgagee; that information was now supplied, and laid before the Court.

De Villiers, C.J., said that a personal order had been served upon the mortgagee, and he did not raise any objection. The order would be granted.

Ex parte CRAIG.

Mr. Molteno applied on behalf of Robert William Craig, a merchant, of Port Elizabeth, for leave to sell certain land.

The petitioner had bought some land in Port Elizabeth in 1895 for his two children. He paid £134 for the land out of his own money, and he had also paid all the rates and taxes. When he bought this land he was under the impression that he could sell it. The price of land had gone up considerably, and he could now get at least £250 for the land. The petitioner pointed out further that if this land were not sold rates and taxes would have to be paid upon it for a great number of years, as there were no buildings thereon, and a considerable amount of money would have to be spent in bringing about a return. This being the case, he thought that it would be better in the interests of the children to sell the land, and invest the proceeds for them in any way the Court ordered. He stated that if the sale did not realise £250 he would make it up to that amount, and if it exceeded that amount he asked that the costs of the application should come out of the balance.

The application was granted.

BACELA V. BACELA.

1898.
March 8th.

Pauper cases—Divorce.

It is not the practice of the Court to grant leave to sue in forma pauperis *for divorce unless the applicant appears in person.*

Mr. McGregor applied on behalf of Mrs. Bacela, a domestic servant, of Port Elizabeth, for leave to sue her husband *in forma pauperis* for divorce.

It was stated that the parties were married in 1877, and in 1880 the husband deserted his wife, since when she had supported herself. She had made inquiries about the whereabouts of her husband, but without success.

Mr. Justice Buchanan asked what was the petitioner's object in getting a divorce after waiting twenty years.

Mr. McGregor said he could not explain the great delay.

De Villiers, C.J., said : It is the practice of the Court not to grant applications of this character unless the applicant appears in person. In this case the applicant does not live in Cape Town, but that is not sufficient. The application must be refused.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN.]

GREEN V. TRUMAN.

1898.
March 9th.

Liquor licence—Railway refreshment-room Sale on Sunday — Conditions — Passengers — Act 25 of 1891.

The appellant held a retail licence for the sale of liquor at Molteno Railway-station which was not a terminal station. It was a condition of the licence that on Sunday, Christmas Day and Good Friday, he could only supply refreshments while passenger trains were drawn up at the station, and the Government reserved to itself the right of closing the platform against all but passengers. The appellant was convicted in the Court below of a contravention of the law because he had on a Sunday sold liquor to certain persons who had not travelled by railway and had no tickets so to travel, but the sale took place while a passenger train was drawn up at Molteno Station.

Held *that, in the absence of any prohibition in the Act or in the licence against such a sale, the conviction could not be sustained under section 24 of Act 25 of 1891.*

This was an appeal from the conviction of the appellant by the Acting Assistant Resident Magistrate of the district of Albert, at a Court held at Molteno on the 8th January last.

The appellant was charged with contravening Act 44 of 1885, section 5 : "In that upon or about the 19th day of December, 1897, and at the Molteno Railway Refreshment-room, in the district of Albert, the said Truman did wrongfully and unlawfully, as lawful manager, superintendent, or conductor of the said refreshment-room for and on behalf of William Hannington Courtney, sell, deal in, or dispose of (1) to Cornelius van Niekerk one glass of wine, (2) to Peter Kirton one glass of beer, the said liquor being disposed of or sold at or about eleven a.m., and (3) at ten p.m., to Cornelius van Niekerk and Patrick O'Brien, each and all severally, one glass of beer, the said Van Niekerk, Kirton, and O'Brien, each and all, at the several times mentioned, being persons to whom the said Truman was not authorised by the licence granted to the said Courtney to sell. none of them being passengers by any train stopping at Molteno Railway-station on the said day at the said time, as hereinbefore stated."

The accused, before pleading, excepted to the summons on the grounds that the charge, if any, should have been preferred against Courtney, the holder of the licence, and not against him.

The accused then gave evidence in support of his exception, which was overruled, the Acting Assistant Resident Magistrate being of opinion that the accused was lawfully conducting or superintending the business on behalf of Courtney within the meaning of Act 44 of 1885, section 11. The accused then pleaded not guilty.

The evidence showed that the accused did sell liquor to the three men named in the summons on the Sunday in question at a time when the train was at the platform, and that he made no inquiries as to whether they were passengers by the train or not.

The licence, which was put in, authorised Courtney to sell intoxicating liquors at the railway refreshment-room at the railway-station at Molteno for twelve months, from the 1st April, 1897, to the 31st March, 1898, upon week days within thirty minutes before the arrival and twenty minutes after the departure of any passenger or mixed train at such railway-station, and upon Sundays, Christmas Day, and Good Friday only during the time that a passenger or mixed train is drawn up at the station and at no other time, subject to the conditions contained in the Act 28 of 1883 and Act 25 of 1891, and subject further to the following condition under and by virtue of sub-section 4 of section 24 of the Liquor Act of 1891, viz.: "The Government reserves the right to close the platform against all but passengers or intending passengers." The accused was found guilty, and sentenced to pay a fine of £3, or seven days' imprisonment.

From this conviction and sentence the present appeal was brought.

Mr. Schreiner, Q.C., was heard in support of the appeal.

The Magistrate has overlooked the fact that by Act 25 of 1891, section 24, sub-section 4, very wide powers are given to the Commissioner with respect to the classification of persons who may be served with liquor; no condition as to the class of persons to be served is inserted in this licence. Sub-section 3 does not apply because this is not a terminal station. *Regina* v. *Logan* (Sheil 1, p. 119) was decided before Act 25 of 1891.

Mr. Sheil, for the Crown: The only point which can be urged on behalf of the Crown is the condition as to the reservation of the right to close the platform against all but passengers or intending passengers.

De Villiers, C.J.: The appellant had a retail licence for the sale of liquor at the Molteno Railway-station, which is not a terminal station. It was a condition of the licence that on Christmas Day, Good Friday and Sunday, he could supply refreshments while passenger trains were drawn up at the station, and at no other time. In the original licence there was a further condition that the holder could only sell to persons who had travelled at least eight miles, or had taken out a ticket for at least that distance, but the condition was afterwards struck out by the Distributor of Stamps. The reason for his striking it out was because such a condition had not been inserted by the Commissioner in the certificate authorising the grant of the licence in terms of section 24 of Act 25 of 1891. The appellant was convicted of a contravention of the law, because he had on a Sunday sold liquor to some persons who had not travelled by railway and had no tickets so to travel, but the sale took place while a passenger train was drawn was drawn up at Molteno Station. It would have been quite competent for the Commissioner to insert in the certificate such a condition as I have just mentioned, but he did not insert it, and the amended licence held by the appellant contained no such condition. The licence did, however, contain a reservation by the Government of the right to close the platforms against all but passengers or those attending passengers. If this right had been exercised at Molteno, the persons who purchased the liquor now in question, would not have been able to enter the refreshment room. But they did enter the refreshment room. and purchased the liquor, and in the absence of any prohibition in the Act or in the the licence against the selling of liquor to such a class of persons, I am of opinion that the appellant ought not to have been convicted. The appeal must be allowed and the conviction quashed.

[Appellant's Attorney, J. Ayliff.]

REGINA V. RAXI AND OTHERS. { 1898. March 9th.

Theft—Evidence.

This was an appeal from a conviction and sentence of the Resident Magistrate at Lady Frere. The appellants, four in number, were charged, together with others, with the theft of seven sheep belonging to one Maliwe. The evidence taken was very voluminous, the principal witness being a boy named Rwatyn, who admitted being an accomplice, and who gave full details as to how the theft was accomplished. The owner of the sheep deposed that he found at a certain shop in the neighbourhood some wool which bore his mark. He had missed his sheep, searched for them, and been unable to find them, but had found the boy Rwatyn in the company of Raxi, and in possession of a skin, which he threw into the water when discovered by him. Upon Rwatyn's evidence the other prisoners were arrested and taken before the headman of the kraal, where Rwatyn again accused them, and where they were subjected to a great deal of cross-examination, lasting a considerable portion of the day; finally, after talking the matter over with the owner of the sheep, they confessed to the headman and offered compensation. The owner was willing to accept this, but the headman refused to allow it, and gave the prisoners into the charge of the police. Before the Magistrate evidence was led to show that Matutu, one of the appellants, could not have been in the locality at the time at which Rwatyn said he was. The alleged confessions were denied. The Magistrate committed the prisoners for trial, but the case was remitted to him under Act 43 of 1885. He then acquitted three, and sentenced four—the appellants—to eleven months' imprisonment and fifteen lashes each.

Mr. Jones appeared for the appellants.

Mr. Sheil for the Crown.

Mr. Jones: The appeal against the sentence is on the ground that under Act 43 of 1885 lashes can not be inflicted where there has been no previous conviction, as in this case. Against the conviction the appeal is based on the insufficiency of the evidence, inasmuch as the evidence is that of an accomplice; that is insufficient without corroboration, and the only corroboration was the alleged confessions, which were not voluntary, even if they were made, and were therefore inadmissible. Further, there was no identification of the sheep as being those of Maliwe.

The Chief Justice: Do you support the lashes, Mr. Sheil?

Mr. Sheil: No, my lord.

The Chief Justice stated that according to the law there could be no lashes except after a previous conviction.

Mr. Sheil said the Magistrate evidently thought that the case had been remitted under Act 35 of 1893.

Mr. Jones: The evidence does not show that they were Maliwe's; they were taken from the kraal of Bulwhana. Maliwe says that he found wool in the shop with his mark upon it, but there is nothing to connect the prisoners with that. He has very probably sold or lost sheep on other occasions.

De Villiers, C.J., said: This is simply a question of credibility. There was clear evidence that a theft had been committed, and the owner of the sheep had certainly lost them. I quite agree that confessions should not be extorted from people in the way they have been, and perhaps it would have been better in this case if the confessions had been of a more voluntary nature than they were, but still we can not lose sight of the fact that the confessions were made, and that they were fully corroborated by the evidence given by other witnesses. This must be said against the prisoners, that they afterwards denied that they made confessions at all, which was clearly untrue, because the evidence of other witnesses is perfectly clear on that point. This is on the whole a case for the Magistrate, and we are of opinion that the conviction ought not to be quashed. Then as to the sentence, the Magistrate was clearly wrong. There was no proof of any previous convictions against these prisoners. The case was remitted under the Act of 1885, and under that Act the Magistrate could not punish with lashes unless there had been a previous conviction. The sentence so far as the lashes are concerned must be amended, otherwise the appeal must be dismissed.

[Appellant's Attorneys, Messrs. Findlay & Tait.]

MALHERBE V. GREWE. { 1898. March 9th.

Magistrate's jurisdiction — Future rights—Marriage action *in rem*—*Status*—*Res judicata*.

In an action in a Magistrate's Court for defamatory words uttered by the defendant to the effect that the plaintiff had been guilty of improper intercourse with other women than his wife, the summons alleged that the plaintiff is a married man. An exception was taken to the jurisdiction and upheld on the ground that future rights would be bound by a decision as to the marriage. Held, on appeal, *that the exception was bad inasmuch as the action was not founded on the fact or validity of the plaintiff's marriage.*

The case of Renwaldsen *v.* Weiss (Buch. 1875, p. 108) *distinguished.*

This was an appeal from a decision of the Resident Magistrate of Robertson at the Periodical Court held at Lady Grey, in an action in which the appellant was the plaintiff and the respondent was the defendant. The plaintiff sued for £20 damages for slander uttered by the defendant to the effect that he (the plaintiff) had been guilty of improper intercourse with certain women. The summons set out that both plaintiff and defendant were married men residing within the district; the defendant's agent excepted to the summons on the ground that the marriage was put in issue, and that a decision on this point was beyond the jurisdiction of the Magistrate. The Magistrate sustained the exception, holding that the question of marriage was raised on the summons, and that it was an important point, inasmuch as it might affect the damages, that no amendment had been applied for, and that he thought Act 20, 1856, section 8, sub-section 3, and the reported cases of *Renwaldsen* v. *Weiss* and *Abner* v. *Makettra* governed this case. The plaintiff appealed.

Mr. McGregor appeared on behalf of the appellant.

There was no appearance for the respondent.

Mr. McGregor: The Magistrate was in error inasmuch as the allegation that the plaintiff and the defendant were married men was purely matter of description. The suit raised no issue as to the validity of the marriage. The Magistrate misunderstood the case of *Renwaldsen* v. *Weiss* (Buch. 1875, p. 150), and Act 20 of 1856, section 8, sub-section 3, does not apply. That case was explained in *Riversdale Divisional Council* v. *Pienaar* (3 Juta, p. 252), and again in *De Wet* v. *Jooste* (9 Juta, p. 240). The judgment could not possibly operate as *res judicata* in any question as to the validity of the marriage. *Bertram* v. *Wood* (10 Juta, p. 177). The Court indicated that it was not necessary to hear counsel any further.

De Villiers, C.J.: In his reasons the Magistrate relied altogether on the cases of *Renwaldsen* v. *Weiss* (Buch. 1875, p. 105) and *Abner* v. *Makettra* (E.D. 1, p. 47), but he appears to me to have missed the real point in those cases. Where proof of the marriage of either party lies at the foundation of an action, the Court has decided that such an action if not falling within the exceptions of the final proviso of section 8, sub-section 3, of Act 20 of 1856, is beyond the magistrate's jurisdiction. It is not quite clear in what manner rights in future would be bound by a decision in an action to recover damages for criminal conversation, and yet the Legislature deemed it necessary to provide that in such an action a magistrate may determine upon the fact of marriage without thereby binding rights in future. The only explanation I can suggest is, that the Legislature was of opinion that an action which requires a decision in regard to the validity of a marriage is a *real* action, involving the *status* of an individual, and that therefore a judgment in such action is binding upon every other Court. But whether this be the correct explanation or not, the section would not justify the Court in holding that future rights would be bound by a judgment in an action which does not require, as a *sine qua non*, a decision in regard to the validity or otherwise of a marriage. What then is the nature of the action brought in the Court below? It was an action for defamatory words uttered by the defendant, to the effect that the plaintiff had been guilty of improper intercourse with other women than his wife. The summons alleges that the plaintiff is a married man, and because this allegation is made, the defendant excepted to the jurisdiction. But the marriage of the plaintiff was not the foundation of the action, which would lie whether the plaintiff were a married man or not. No doubt the fact of his being a married man might affect the question of damages, but a decision in regard to the fact of the marriage was not necessary for the purpose of the action. The exception ought not to have been allowed, and the judgment must therefore be reversed, with costs in this Court, and the case remitted to the Court below on its merits.

[Appellant's Attorney, C. W. Herold.]

SAUERMANN v. ENGLISH AND SCOTTISH LAW LIFE ASSURANCE ASSOCIATION.
1898.
March 9th.
„ 10th.

Life Insurance — Premium — Contract — Nominal damages — Failure of consideration—Policy — Reasonable time—Appeal.

Upon payment and acceptance of the premium a contract of insurance is complete for the period for which the premium was paid although no policy is delivered to the insured. In the absence of any stipulation as to time the policy must be delivered to the insured within a reasonable time, but he is not entitled to recover back the premium if the policy is not delivered to him within such reasonable time, there being no failure of consideration for the payment of the premium.

The plaintiff's application for the insurance of his life having been accepted by the defendant company, he paid the half-yearly premium and received a receipt by which the company undertook to give him a policy. The policy was sent from England to the company's agent in this colony, who never delivered it to the plaintiff. Before the lapse of the period for which the premium had been paid the company offered to issue a fresh policy at the same half-yearly premiums, and otherwise on the same footing as the missing policy, but the plaintiff refused the offer and claimed back the premium on the ground of failure of consideration, or in the alternative damages for breach of contract. The plaintiff admitted that he did not require the policy for the purpose of raising money thereon. The Magistrate, having dismissed the case.

Held, *that the premium could not be recovered back and that inasmuch as the evidence would not have justified the Court below in awarding more than nominal damages for a technical breach of contract, the Supreme Court should not disturb the judgment.*

This was an appeal from a decision of the Assistant Resident Magistrate of Cape Town in an action in which the appellant sued the respondent company for the sum of £20 damages, or alternatively for the refund of the sum of £5 8s. 6d., owing to the breach of a contract to provide him within a reasonable time after acceptance of his insurance premium with a proper and legal life policy.

The evidence showed that on the 30th November, 1896, the appellant insured his life with the company for £300. He paid the premium £5 8s. 6d. to one Parkes, an agent of the company, and received a receipt. He did not receive a policy, although he applied for it. He paid a second premium in May, 1897, and received a receipt from the company, but though frequent application had been made he had not obtained the policy. The resident secretary of the company deposed that a policy had arrived here from Home and had been delivered to Parkes, and they were under the impression it had reached its destination. He did not know what had become of Parkes. The company would not issue a new policy until the old one had lapsed. He suggested to the appellant that he should let the policy lapse at the end of the year, and that he should make a fresh proposal next year and get a policy on the same terms, assuming that there had been no dealing of any kind with the policy. The appellant was not satisfied with the reply of the secretary to his application and brought his action.

The Assistant Resident Magistrate gave judgment for the defendant, with costs.

His reasons were as follows: I found that although the policy was not delivered to the plaintiff, and the non-delivery was owing to the negligence of the agent of the defendant company, the plaintiff was not prejudiced thereby, inasmuch as (1) he had not, during the year for which the policy ran, any occasion to make use of the same. (2) In case of his decease, the receipts for premiums paid would have been treated by the defendant company as the policy, and plaintiff had notice of this. (3) The defendant company agreed that a fresh policy should be issued for the second year carrying all privileges such as bonuses, &c., as might have accrued during the first year of assurance. Upon these findings I hold that plaintiff has suffered no injury, and is not entitled to recover damages.

Mr. Jones for the appellant.

Mr. McGregor for the respondent.

Mr. Jones: The ground of action was the breach of contract. The contract was not merely to insure plaintiff's life, but to supply him with a policy which would be evidence in case of his death. Without the policy he does not know the terms or conditions of his insurance. He is also at a pecuniary disadvantage; it is often the object of an assurer to protect his interests in other matters by a pledge or assignment of his policy—this requires actual delivery of the policy. The company moreover expressly agreed in writing to deliver a policy and have failed to do so. The suggestion as to allowing the policy to lapse, and issuing a fresh one came from the agent, but only the directors have power to revive lapsed policies. There is nothing to bind them to this in case they find that the plaintiff has failed in health. If plaintiff cannot sue now for a policy, still less will he be able to sue next year on the mere undertaking of the agent. The authorities seem to be clear as to the right of the insured to have a policy issued to him, or a refund of the premiums or damages. *Crawley on Life Assurance* (p. 101); *Porter on Insurance* (pp. 21, 23, 418, 423); *Canning* v. *Farquhar* (16 Q.B.D., p. 727).

Postea (March 10th).

Without calling on Mr. McGregor, judgment was given dismissing the appeal.

De Villiers, C.J.: This is an appeal against the judgment of the Assistant Magistrate of Cape Town. The action was for damages for breach of contract or, in the alternative, for the repayment of a certain premium paid by the plaintiff for the insurance of his life with the defendant company. The alleged breach of contract consisted in the company's failure to deliver to him a policy of insurance within a reasonable time. The explanation of the delay given by the company, which is domiciled in England, is that the policy was sent to its then agent here, who, for some unexplained reason, never delivered the policy to the plaintiff. The company was willing, however, to issue a fresh policy and to give the plaintiff the same benefits in respect thereof as if it had been issued on the payment of the first premium. The plaintiff was not satisfied with the proposal and instituted the present action. Technically there was a breach of contract, because although no time was specified for the delivery of the policy more than a reasonable time had elapsed. But the plaintiff is not entitled to recover the premium paid by him unless there was a failure of consideration. The company has all along admitted its liability, in case of the plaintiff's death within the half-year for which the premium was paid, to pay the amount of the insurance. Apart from such admission, the very case quoted on behalf of the plaintiff—*Canning* v. *Farquhar* (16 Q.B.D., 727)—contains a statement of the law by the Master of the Rolls which supports the liability of the company. "If," said he, "the premium is offered and accepted there is at once an insurance, and the year for which the insurance runs commences then, and if the policy is drawn up properly that will appear in it." If the contract was complete on the acceptance of the premium there was no failure of consideration and the premium cannot be recovered back. But, then, it is said the plaintiff is entitled to damages for breach of contract. The difficulty is to discover what damages the plaintiff has sustained from the breach of contract. He admits that he did not require the policy for the purpose of raising money thereon. In the event of his death during the interval between the payment of the premium and the proposed issue of a fresh policy his representatives would have been entitled to the amount of insurance. The defendant company was willing to place the fresh policy on exactly the same footing as the missing one and the amount of the premium would have been the same. If the Court below had awarded nominal damages this Court would not have disturbed his judgment, but it is not usual for Courts of Appeal in this colony to interfere with any judgment which dismisses the claim of a plaintiff who, at the best, is only entitled to nominal damages for a merely technical breach of contract.

The appeal must therefore be dismissed with costs.

[Appellant's Attorney, D. Tennant: Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT

[Before the Right Hon. SIR J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice BUCHANAN.]

CORTES V. FILBY. { 1898. March 10th.

Summons — Service — Magistrate's Court—Re-opening judgment—29th rule of Magistrates' Courts.

In a proceeding in a Magistrate's Court for re-opening a judgment, under the 29th Magistrate's Court Rule, on the ground that, having been duly summoned, the applicant was by just and reasonable cause prevented from attending the Court in pursuance of the summons, the question to be determined was whether the applicant had notice of the summons before the day of trial. The Magistrate held, on the evidence, that the applicant had such notice and refused to allow the judgment to be re-opened. On appeal the objection was raised that the original summons had not been duly served. Held *that this objection could not now be raised, and that as the evidence satisfied the Court that the summons had come to the appellant's notice before trial, he was not entitled to have the judgment re-opened.*

This was an appeal from a judgment of the Assistant Resident Magistrate of Cape Town, refusing to allow Antonio Cortez, the appellant (applicant in the Court below), to re-open a certain matter in which a decree of ejectment from certain premises in Salt River had been given against him by the Resident Magistrate in his absence. The plaintiff in the Court below was Henry Filby.

The records of the Magistrate's Court showed that the summons purported by the return endorsed thereon to have been duly served by the messenger of Court by nailing it on appellant's shop door on January 4, but the date of issue on the summons was January 5. The appellant stated that he was not at the shop between January 4 and January 10, and did not see the summons until then, while judgment was given in the case on January 7.

The application for the re-opening of the matter was made under section 29 of Schedule B of Act 20 of 1856.

The Magistrate gave the following reasons for his judgment: In this case I found that the defendant was not absent from home at the time the summons was served, and that he knew on the 4th January, 1898, the date upon which the copy was nailed to his shop door, that the summons was so served. On the following day he called on the wife of the plaintiff with his legal adviser to discuss the action in question, but he failed to attend the Court in pursuance of the said summons, and at the hearing of the application to re-open the case, he failed to show that he was by just and reasonable cause prevented from attending the Court on the date provisional judgment was granted against him. Under the circumstances, I was of opinion that the interests of justice would not be served by re-opening the case and I therefore refused the application.

Mr. McGregor appeared for the appellant.

Mr. Close for the respondent.

Mr. McGregor: Act 20 of 1856, schedule B, rules 8 and 10; Act 17 of 1876, section 12, as to service of summons. The Court may dispense with strict observance of its own rules but not of rules laid down by statute. (Annual Practice, 1893, p. 1,113). The service was irregular and the summons itself was null and void when served. It was undated then and therefore was no summons. The date is important because a summons interrupts prescription. If null and void it need not be obeyed. *Vromans* (pp. 189, 190, 191, 193); *Voet* (2, 4, 14); *Hansen and Schrader* v. *Pauling* (4 Juta, p. 92).

[De Villiers, C.J.: Rule 29 of schedule B only applies where the summons has been duly served.]

It is also a course which might be taken at any time. The Court might take that course *mero motu*. We are in the position of having received no summons at all.

Mr. Close was not called upon.

De Villiers, C.J.: It is unnecessary to decide what the appellant's rights and remedy would have been, if he had not taken proceedings under the 29th Rule of the Magistrate's Court for re-opening the judgment in the action for ejectment brought against him by the respondent. The summons in that action seems to have been served the day before it was duly issued from the Court, and the service itself was irregular by being posted on the door of the appellant's shop, without any attempt to find him at his residence. But the question raised in the present case in the Court below was not whether the summons had been duly served on the appellant, but whether, having been duly summoned, the appellant was by just and reasonable cause prevented from attending the Court in answer to the summons. The appellant alleged that he did not know of the summons in the action for ejectment until after judgment had been given thereon, whereas the respondent and his witnesses asserted that the appellant was fully aware of the terms of the summons and had been seen reading the copy affixed to his shop door. This was the only question to which the attention of the Court below was directed, and on which the Magistrate based the reasons for his judgment. Here, however, the objection is taken that the original service was bad. In my opinion this objection comes too late. I am satisfied that, if the appellant was duly summoned, as we must assume for the purpose of this appeal that he was, he was not prevented by just and reasonable cause from attending the Court, and that the appeal must accordingly be dismissed with costs.

Buchanan, J., concurred, and called attention to the non-compliance with the rules of Court by which service at the place of residence should only be made when neither defendant nor any of his household could be found after diligent search. The evidence showed that the messenger never went to the residence of defendant, but only went and posted the summons on the shop door. If that objection had been taken originally he thought the proceedings could have been set aside. However, that objection had not been taken.

[Appellant's Attorney, A. P. Kenealy; Respondent's Attorney, J. Ayliff.]

VAN DER MERWE V. COLONIAL GOVERNMENT. { 1898. March 10th. „ 12th.

Crown land—Quitrent grant—Expenses of grant—Survey expenses—Act 37 of 1882.

A licensee of land under Act 37 of 1882 is bound, on obtaining a title deed at the expiration of his licence, to pay the expenses reasonably incurred by the Government in surveying the land and framing a diagram thereof.

This was a special case stated for the decision of the Court in the following terms:

1. The plaintiff, Jacobus Petrus van der Merwe, is a farmer residing in the district of Komgha. The defendant is the Secretary for Agriculture, and as such represents the Colonial Government.

2. In the year 1885 the then Commissioner of Crown Lands duly issued to the plaintiff a licence under the Agricultural Lands Act, 1882, to hold and occupy certain Crown land in the district of Komgha, Field-cornetcy No. 5, being lot No. 2 of farm 355, and measuring 248 morgen and 350 square roods.

3. Plaintiff duly occupied the said land in terms of the said licence until the year 1889, when the licence became forfeited and the land was resumed by the Government.

4. On the 26th March, 1892, the then Commissioner, upon the application of the plaintiff, issued a fresh licence to him under the same Act, and in respect of the same land. A copy of the said licence, together with a diagram attached to it, is annexed to this case, and the parties pray that it may be considered as if incorporated herein.

5. The land in question was surveyed in 1884, and the diagram attached to the said licence is a diagram duly sufficient for the purpose of the issue of a quitrent grant in respect of the said land.

6. The period of the said licence has now expired, and all the terms and conditions thereof have been fulfilled by the plaintiff, who has now the right to demand a quitrent title to the said land, as provided by section 24, Act No. 15 of 1887.

The defendant is willing to issue such quitrent title upon payment by the plaintiff of the sum of £4 12s. 3d. for stamps and fees of office, and the sum of £12 9s. 8d. for expenses of survey and diagram. The plaintiff is willing to pay the sum of £4 12s. 3d., but he refuses to pay the said sum of £12 9s. 8d.

The plaintiff contends that he is entitled without payment of any expenses for survey and diagram to a quitrent grant of the said land at an annual quitrent equal to the yearly licence fee and subject to the conditions set forth in section 24 of Act 15 of 1887.

The defendant contends that the plaintiff is not entitled to a quitrent grant of the said land unless he pays the expenses of survey and diagram.

Wherefore the parties pray the judgment of this Honourable Court in terms of their respective contentions with costs.

The licence annexed was as follows:

Act No. 37 of 1882.

Licence to occupy Crown land.

By virtue of the provisions of the Act No. 37 of 1882, entitled the "Agricultural Lands Act, 1882," as amended by section 23 and 24 of Act 15 of 1887, licence is hereby given to Jacobus Petrus van der Merwe to occupy the Crown land represented and described in the diagram hereunto annexed, situate in the division of Komgha, Field-cornetcy of No. 5, being lot No. 2 of farm 352, and containing two hundred and forty-eight morgen three hundred and fifty square roods (248 morgen 350 square roods).

This licence is issued subject to the following conditions, viz.:

1. The licensee shall pay to the Civil Commissioner of the division in which the land is situated, the sum of nine pounds six shillings and four pence sterling. (£9 6s. 4d.) annually for the period of five years, commencing from the 1st July, 1892, and terminating on the 30th June, 1897.

2. The first payment shall be made on the 1st July, 1892, and thereafter on each successive first day of the said month in advance.

3. The licensee shall within six months after the issue of this licence personally reside on the land herein described, and shall continue so to reside for a period of three years from the date of the issue of this licence.

4. The licensee shall within two years from the date of his licence bring under cultivation one-twentieth part of the land occupied by him under this licence, or shall enclose the same with a substantial fence.

5. The licensee is further subject to all such conditions as are provided in said Act No. 37 of 1882, a copy of which Act is printed at the back of this licence, and as are applicable to his occupation under the said licence, and especially the conditions referred to in sections (*a*) and (*b*) of clause 23 of the said Act.

6. All roads and thoroughfares running over this land, whether they are described in the diagram or not, shall remain free and uninterrupted.

Mr. Innes, Q.C., for the plaintiff: The question is whether the decision in the case of *Indwe Railway Co.* v. *The Colonial Government* (7 Sheil, p. 220) governs the case of land issued under Act 37 of 1882. This is the only statute amongst those which deals with the sale of Crown lands which makes no provision for the payment of survey expenses. Section 24 of Act 15 of 1887 provides and substitutes a new section 18 for Act 37 of 1882; the wording is unfortunate but it clearly means that title-deed shall be issued subject to the condition stated in the 5th section of Act 15 of 1887, and that says nothing about survey expenses All the other statutes expressly provide that the purchaser shall pay expenses of survey, &c. We demand title-deeds, and if the Government can grant us title without a diagram we are willing to accept it. This case differs from the *Indwe* case inasmuch as there the parties had contracted to purchase land under Act 15 of 1887, and they must be taken to have had the whole of that statute in view. There it was a question of the intention of the parties; here it is a question of the intention of the Legislature.

Mr. Sheil, for the Government: It is submitted that the object of Act 15 of 1887, section 24, in repealing the 18th section of Act 37 of 1882, was merely to impose the conditions set forth in section 5 of the former Act in place of the conditions imposed by the repealed Act 14 of 1878, section 10, both being general conditions. The title still remained a quitrent title, and was issued subject to the general rule and custom, that survey expenses must be paid by the purchaser or grantee. This has been recognised by all the Land Acts passed since 1860, *Vide* Act 2 of 1860, schedule section, 4, Act 1 of 1877, section 3 (*b*). Act 14 of 1878, section 7, Act 15 of 1887, section 2 (*e*), Act 40 of 1895, section 18.

If any doubt did exist the Court would apply the principle established in the *Indwe Case* (7 Sheil, 230). All the equities are in favour of the defendant. The Treasury seeks no profit but claims to recover expenses fairly and reasonably incurred for the benefit of the grantees.

The sum in dispute in the present case is small, but large amounts are involved in the issue.

Mr. Innes, in reply: The words of the original section 18 of Act 37 of 1882 are, "in terms of Act 14 of 1878." Either that relieved us by meaning to refer only to the terms of those sections which regulated the tenure, or else it referred to the whole Act, and did not relieve us. If it did not relieve us, there has been a change in the law since. A custom that the purchaser shall pay survey expenses in the case of a sale between private persons cannot affect the interpretation of this statute.

C.A.V.

Postea (March 12th).

Judgment was given.

De Villiers, C.J., said: The question raised by this special case is whether a licensee of land under Act 37 of 1882 is bound, on obtaining a title deed at the expiration of his licence, to pay the expenses reasonably incurred by the Government in surveying the land and framing a diagram thereof. The 18th section of the Act, as it originally stood, enacted that the licensee "shall obtain a grant or quitrent in terms of Act 14 of 1878." The 7th section of Act No. 14 of 1878, read by the light of the 4th section, enacts that the expenses of survey shall be paid to the Civil Commissioner by the grantee. It is clear, therefore, that until the passing of Act No. 15 of 1887 licensees of agricultural lands under the Act of 1882 were bound to pay the expenses of survey and diagram before they could claim title. The 24th section of the Act of 1887 substitutes the following enactment in lieu of the 18th section of the Act of 1882: "At the expiration of any licence and on the fulfilment of the terms and conditions of such licence, the licensee shall obtain a title deed on quitrent tenure. . . . subject to all the conditions contained in the 5th section of this Act." The words "this Act" can only refer to the Act of 1887, but the expression is most unfortunate seeing that the new section became incorporated with and part of the Act of 1882. The 5th section of the Act of 1887 states the general conditions subject to which Crown lands are to be sold under it, and none of these conditions refers to the expenses of survey and diagram. The plaintiff contends that the effect of the new section is to relieve licensees of the payment of the expenses which, under the Act of 1882, they were bound to pay. The drafting has certainly been very clumsy but if the Acts are construed with the aid of certain well-established rules of conveyancing the meaning of the Legislature becomes reasonably clear. In the alienation of land the presumption always is that the grantor and grantee, or transferor and transferee, intended that the grantee or transferee shall pay the expenses of the grant or transfer, including the costs of survey necessary for the purpose of such grant or transfer. This presumption arises out of a usage which has been recognised in the Colony ever since the establishment of the Deeds Registry. It has been said on behalf of the plaintiff that this usage applies only to sales of land, but even if this view be correct, the transaction between the Government and the licensee, under the Act of 1882, is really in the nature of a sale. A quitrent is payable by the latter, but he may, under Act 40 of 1895, at any time redeem the quitrent by the payment of a sum equal to twenty times such annual quitrent. In the present case the plaintiff admits that he is liable to pay for the stamps and fees of office as part of the expenses of transfer, but in my opinion the costs of the survey and diagram also fall under the expenses of transfer, and must be paid by the licensee. The judgment must therefore be in terms of the defendant's contention, with costs.

Mr. Justice Buchanan concurred, saying that before the recent Act the only way in which Government lands could be sold was by an annual quitrent. This quitrent was recognised as a purchase, and that being so, it was a purchase from Government, and the purchaser must pay the usual expenses.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre & Bisset: Defendant's Attorneys, Messrs. J. H. Reid & Nephew.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and Hon. Mr. Justice BUCHANAN.]

BRITISH AND TRANSVAAL FINANCIAL COMPANY, LIMITED V. SALTPETRE FIELDS, LIMITED.

Mr. Molteno applied for provisional sentence for the sum of £1,500 upon a mortgage bond.

Granted.

HENDRICKS V. FINN.

Mr. Gardiner applied for provisional sentence for £600, less the sum of £72 paid on account, due on the purchase of certain property.

Granted.

ROBERTSON V. SCHALKWYK'S EXECUTORS.

Mr. Gardiner applied for provisional sentence for £1,500, due on a mortgage bond.

Granted, subject to the production of a certificate of the executrix' appointment.

FLETCHER V. H. O. GRAY AND J. F. CARSTENS.

Mr. Close applied for provisional sentence on two promisory notes, for £33 18s. 9d. and £128 4s. 8d. respectively.

Granted.

THERON V. THERON.

Mr. Buchanan applied for an order for the final adjudication of defendant's estate.

Order granted.

HUNTER V. EVERITT.

Mr. Jones moved for judgment for £64 3s., balance of account for services rendered on account of a certain building contract.

Order granted.

MENDELSSOHN AND CO. V. STEIN.

Mr. De Waal moved, under Rule 329, for judgment for two sums, £15 9s. 2d. and £7 7s. 6d. respectively, for goods sold and delivered, with interest *a tempore moræ*.

Order granted.

MARQUARD'S EXECUTORS V. DANIELS.

Mr. Maskew moved for provisional sentence for the sum of £500, less £442 paid on account, with interest *a tempore moræ*, being purchase price of a dwelling-house.

Order granted.

REHABILITATIONS.

Orders for rehabilitation were granted in the cases of Gert Luyt, Benjamin Hulley, and Hugh Gilchrist.

IN THE INSOLVENT ESTATE OF LOUIS JOHANNES VAN WYK.

Mr. McGregor applied that the rule *nisi* granted in this case be made absolute. The order of the Court had been duly complied with.

The rule was made absolute, with a rider that the Master be authorised to call a special meeting of creditors in the estate.

DUTCH REFORMED CHURCH V. TOWN COUNCIL OF CAPE TOWN.

1893.
March 12th.

Valuation—Municipality—Appeal — Rates.

Under the 92nd section of Act No. 26 of 1893, an owner or occupier of land in Cape Town, who has duly lodged an objection to a valuation as originally made by the valuer, may apply to the Supreme Court for the review of a decision of the Valuation Court upon such objection, and the Supreme Court may reduce the valuation, if it is clear that the valuation was excessive and was duly objected to.

This was an application by the Kerkeraad of the Dutch Reformed Church, Adderley-street, against the decision of the Valuation Court. The petition set forth that the ground, which is attached to the Court, was valued at £42,553 by the Town Council valuator. The Church objected to this valuation, and the Valuation Court reduced it to £31,728, calculating the value of the ground at so much per foot. The grounds of the application were, firstly, that that land was not land liable to be rated, as being part of a place used for public worship, and, secondly, that even if it were liable to be rated the valuation was excessive. In support of this latter contention, a remeasurement that had been made since the Valuation Court was put in, showing a difference between it and the original measurements of £2,500, calculated on the basis of so much per foot, which the Valuation Court had adopted. The correctness of this remeasurement was admitted by the defendants. As to the question of rating, it was submitted that that was not before the Court, the Town Council having decided not to bring up the question of the rating of the property at present.

The notice of valuation served upon the applicants was in the following terms: "I beg to inform you that the immovable property as hereinafter described, and of which you are stated to be the proprietor, has been valued as stated below for the purpose of levying Municipal rates thereon. Should you desire to object to the said valuation, you are hereby required to give notice in writing of such objection to the undersigned within fourteen days from the date of this notice, failing which the interim valuation will be fixed and binding until the next valuation is made."

Mr. Rose-Innes, Q.C., for the plaintiffs.

Mr. Schreiner. Q.C., for the Town Council.

Mr. Innes: The application is made under Act 26 of 1893, section 92. The ground of the application is, first, that the land is not liable to be rated at all; and, secondly, that the valuation is excessive.

[De Villiers, C.J.: Can we decide that it is not liable to be rated before it is attempted to levy a rate on it?]

Act 26 of 1893, section 87, provides for the valuation of all immovable property, differing from the General Municipal Act of 1882, which provides only for the valuation of ratable property. This land is put on the valuation roll, and it is done for the purpose of rating: we are therefore bound to come to the Court now because if it is afterwards held to be ratable we shall be bound by the valuation. We come upon a notice served on us that the property would be valued for rating purposes.

[De Villiers, C.J.: You come in appeal from the Valuation Court. I don't see how in this proceeding we can give a decision as to the legal right to rate the property.]

In *Claremont Sanatorium* v. *The Municipality* (7 Sheil, p. 231) the Court gave a declaration that the land was not ratable. As to the valuation itself it is clearly excessive.

Mr. Schreiner: There are no grounds for review in this matter; there can only be a review on account of irregularity or improper conduct on the part of the Valuation Court. This is really an appeal, but there is no appeal in law. Act 45 of 1882, section 124, speaks of an appeal to the Magistrate. Claremont Sanatorium case was decided under that Act. Act 26 of 1893, section 92, was never intended to lay upon this Court the burdensome duty of deciding upon the proper valuation. We contend in any case that the property is of the full value apportioned to it.

Mr. Innes, in reply: *Breda* v. *Town Council of Cape Town* (6 Juta, p. 71) is in point. In the Claremont case it was agreed by the parties that the Court should decide the whole matter.

[De Villiers, C.J.: Mr. Schreiner, if the Valuation Court has made a mistake in the extent of the land, while valuing it at a certain value per square foot, ought not the Court to correct the error?]

Mr. Schreiner: We do not object to the reduction being made in this case, on condition that it should not be made a precedent. Where the valuation has once been made on a certain basis it is not open to the owner of the property to have it measured subsequently and then object. Fresh evidence cannot be produced afterwards.

De Villiers, C.J.: This is an application for the review of a valuation made by the Valuation Court of Cape Town in respect of the applicants' property surrounding the Dutch Reformed Church, Adderley-street. There is a further application for a declaration that the property is not liable to be rated, as being part of a place used for public worship, but the Court is not in a position to express any opinion on this part of the case. From the affidavits it would appear that the respondent Council has not yet decided upon rating the property and the better course for the applicants is to raise the question of liability when they are sued for the rates. Under the 87th section of Act No. 26 of 1893, the Council is empowered to cause a valuation to be made of all immovable property within the Municipality and in the exercise of this power they caused the property in question to be valued. The applicants being dissatisfied with the valuation of the valuer lodged an objection thereto, and a reduction was made by the Valuation Court. Being still dissatisfied with the amount fixed by that body they appealed to this Court under the 92nd section of the Act. The respondents' counsel contends that this Court can only review a decision of the Valuation Court on the ground of some irregularity or illegality in its proceedings, but that there is no appeal against the amount awarded. I do not so construe the 92nd section, nor did the

Council so construe it when a notice was sent to the applicants informing them that the valuation would become binding, unless they brought the decision in review within a certain time before the Supreme Court. An owner or occupier who has duly lodged his objection to the valuation as originally made is entitled, if the objection is not sustained in the Valuation Court, to substantiate it in this Court. The concluding words of the section show that this Court may not only set aside a valuation, but may also vary it. I quite agree, however, that this Court should not vary any valuation except on clear and weighty grounds. Do such grounds exist in the present case? It is admitted on behalf of the Council that the valuation was based upon the value per square foot of the property in question, and the statement in the applicants' affidavits was not denied, that the Valuation Court expressed the opinion that the property, which had been roughly measured by the valuer, ought to be remeasured by a sworn surveyor in order to arrive at the exact value. Instead, however, of procuring such a remeasurement, the Council called upon the applicants either to accept the valuation based upon the rough measurement or to apply to this Court for a review. The applicants thereupon had the property surveyed by a duly qualified surveyor, with the result that the area is found to be much smaller than the area upon which the Valuation Court based its calculation. Clearly, therefore, this is a case in which relief should be granted by the Supreme Court. The amount fixed by the Valuation Court is £2,500 in excess of the correct amount, and to that extent the valuation must be reduced. The costs must be paid by the Council.

Mr. Justice Buchanan concurred, and referring to a former judgment of his in *Breda* v. *Town Council of Cape Town*, said that these two cases were examples of the kind of case in which the Court might alter the amount assessed by the Valuation Court.

[Applicants' Attorney, C. C. Silberbauer; Respondents' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice BUCHANAN.]

GENERAL MOTIONS.

JACOBUS V. JACOBUS.

1898.
March 14th.

This was an application on notice to the respondent, Hendrick Marthinus Jacobus, to show cause why he should not be ordered to pay the applicant, his wife, the sum of £10, to enable her to institute proceedings for judicial separation on the ground of his adultery, and also cruelty towards applicant, he having driven her from the house in May, 1897, and having since refused to give her assistance, either monetary or otherwise. Respondent admitted having committed adultery, but only after his wife left him, and he denied any cruelty towards her. There was in the joint estate a house at Rosebank valued at £500. It appeared that applicant had first instituted proceedings for divorce, but afterwards withdrew them, and now wished to institute proceedings for judicial separation instead.

Mr. McGregor for the applicant.

Mr. Joubert for the respondent.

[De Villiers, C.J.: Is there any precedent for an application for funds by a wife in order to bring an action for separation? In all the reported cases she has been the defendant.]

Mr. McGregor: *Blommestein* v. *Blommestein* (F. p. 81). That was an action for divorce. *Van Niekerk* v. *Van Niekerk* (6 Sheil, p. 236); *Tyfield* v. *Tyfield* (3 Sheil, p. 393). The application can be based on the ground that the parties are married in community. Cruelty is shown by the expulsion *Hoffa* v. *Harper* v. *Harper* (4 H.C.R., p. 250), *per* Jones, J.

[De Villiers, C.J.: Why were the divorce proceedings withdrawn?]

I understand that it was because the applicant had herself been guilty of adultery.

Mr. Joubert: There can be no precedent for a case of this nature. The expulsion was natural; but at that time the respondent had not committed adultery. The sole object of the application is to obtain possession of the half of the property.

Mr. McGregor in reply.

[De Villiers, C.J.: Is the respondent willing to take his wife back to live with him?]

Mr. Joubert: Yes.

De Villiers, C.J.: There is not a clear case made out of such cruelty as would justify the Court in granting a decree of judicial separation if that were before us. I am not prepared to say whether if a clear case were made out the Court would not order the respondent to assist the wife in bringing an action against him. The parties are married in community of property, and there ought to be some means whereby she could obtain money for the purpose of obtaining satisfaction if she had a *prima facie* case. As far as I can judge, the cruelty is not such cruelty as would justify the Court in granting a judicial separation. The husband is willing to take her back to him, and seeing that she has been just as guilty as he has been, it was her duty to go back. No order will be made upon the application. There will be no order as to costs.

Mr. Justice Buchanan concurred.

[Applicant's Attorney, D. Godlonton: Respondent's Attorney, C. W. Herold.]

IN THE ESTATE OF THE LATE SAMUEL JOHN PETTIFER.

Mr. Molteno moved for an order authorising the payment of certain claims out of the funds of the estate.

The order was granted in terms of the Master's report.

DOLLIE AND OTHERS V. AJAM.

1898. March 14th.

This was a motion for an order compelling respondent to allow an inspection of the books of the church at the corner of Long and Dorp-streets. It was stated that in December, 1897, the Imaum of the Mosque died, and the respondent called a meeting, but not, it was alleged, of the whole congregation, and was elected Imaum. The applicant wished to make an inspection of the books of the congregatior for the purpose of calling another meeting of the congregation, but was refused permission to make such inspection on the ground that he was not a member of the congregetion.

Mr. McGregor for the applicants.

Mr. Innes, Q.C., for the respondent.

The respondent has refused to allow Dollie to inspect the books, he not being a member of the congregation: but he has never denied the right of the other two applicants who have been conjoined with him to inspect the books, as they belong to the congregation.

Mr. McGregor: We did not receive an offer to that effect until after February 16.

De Villiers, C.J., suggested that the two last-named applicants be allowed to inspect the books. As to the cost of the application, that question could be reserved until after the prospective action had been brought in that Court, if any action arose.

Mr. Innes: The respondent is willing that all the applicants should inspect the books, as long as it does not prejudice the respondent's right to object to their voting as being members of the congregation.

De Villiers, C.J.: There will be no order on the application, but the right will be reserved to either side to apply at some future time for the costs of this application, it being understood that the applicants will have liberty to inspect the books.

Mr. Justice Buchanan concurred.

[Applicant's Attorney, Messrs. Fairbridge, Arderne & Lawton: Respondent's Attorney, C. C. Silberbauer.]

LEVIN V. THE COLONIAL GOVERNMENT.

Mr. Innes, Q.C., moved for an order placing the executors of the late Jacob Levin on the record in the above action, which had been instituted by the aforesaid deceased for the recovery of certain money for goods supplied to the Railway Department.

Mr. Sheil, for the Government, consented to the substitution, but objected to the costs being costs in the cause, on the ground that no costs ought to have been incurred, because the substitution ought to have been obtained by an entry in the Chamber-book, and the present application to the Court was unnecessary.

Mr. Innes said that he was not prepared with any authority as to the practice in such cases, but if it had been brought to his attorneys' notice that it could be done by an entry in the Chamber's book they were quite prepared to have done so.

The Court made an order placing the executors on the record, but ordered the applicant to pay costs, except such costs as would have been incurred if the application had been made to a Judge in Chambers, which would be costs in the cause.

IN THE MATTER OF THE PETITION OF JULIA ELIZABETH D'ASTRE.

Mr. Buchanan moved for an order authorising the petitioner to transfer certain property without the assistance of her husband, and to authorise her generally to manage her own affairs for the future without such assistance. It was stated for the petitioner that an ante-nuptial contract had been entered into, but was not filed, and a copy of it could not now be got, although diligent search had been made. Some property had been left petitioner, which she had sold for £1,000, but she could not pass transfer, and the purchaser was pressing for the same. Owing to unhappy differences, petitioner and her husband were not living together, and she could not get his assistance to pass transfer. The husband was living in France.

The Court granted only the first part of the order prayed for, viz., to pass transfer of the property in question.

IN THE ESTATE OF THE LATE JOHANNES ALBERTUS LAUBSCHER, SEN.

Mr. Close moved for an order authorising the payment, out of the funds of the estate, of a certain sum towards the education of the minor children of Anna Maria Brink, a daughter of the deceased. The money being in the hands of the South African Association the Master had not been applied to for a report on the matter.

The Court held that no order should be granted, as the usual course must be followed, and the matter first referred to the Master.

THE COLONIAL GOVERNMENT V. HLUBI.

Mr. Sheil applied for leave to sue the respondent, a native chief now residing in Zululand, by edictal citation for specific performance of a contract for the purchase of a certain farm in East Griqualand from the Government.

The order was granted, summons returnable on May 2, the service to be personal, and notice to be served on the two sureties.

IN THE INSOLVENT ESTATE OF P. F. HAUPT AND D. B. HAUPT—TRADING AS THE CAPE TOWN PARCELS EXPRESS.

Mr. Buchanan moved for the appointment of a provisional trustee in the above insolvent estate, which had been placed under sequestration by an order granted by Mr. Justice Buchanan on March 9 last. It was stated that Mr. Van Noorden, who is the largest creditor, had been appointed by the Master *curator bonis*, and had now charge of the horses in the estate. This appointment had been made after the case had been set down for hearing.

No order was granted, but the costs of the application were ordered to be paid out of the estate.

CARSTENS AND CO. V. THE COLONIAL GOVERNMENT.

Mr. Sheil applied under Rule 390 for leave to sign judgment against plaintiff for not proceeding with his action.

Mr. Justice Buchanan said that an application for the sequestration of the estate of Carstens & Co. had come before him on Saturday and been granted.

Under the circumstances, the matter was allowed to stand over pending the appointment of a trustee.

IN THE MATTER OF THE LUNATIC EDWIN MALLETT.

Mr. Jones applied on behalf of Alfred Charles Mallett, curator in the estate of Edwin Mallett, a lunatic, for an order authorising him to dispose of the assets of the lunatic in his partnership business with one Francis Humphrey Wedge, to his partner. The price offered was practically £900, and the Master had reported that he considered that the offer made was decidedly in favour of the lunatic.

The order was granted.

PETITION OF ALEXANDER THOMAS WOOD AND CHARLOTTE ANNIE CROSBY.

Mr. Buchanan applied for leave to the parties to enter into a post-nuptial contract.

An order was granted, on the usual terms as to saving of the rights of creditors.

PETITION OF ELIZABETH JOHANNA MARIA VAN WYK.

Mr. Close moved for the appointment of a *curator ad litem* to applicant's husband, to enable her to institute proceedings to have her said husband declared of unsound mind and incapable of managing his affairs.

Order granted, Joshua Johannes le Roux being appointed *curator ad litem* ; summons returnable at the ensuing Circuit Court at Queen's Town,

ROUX V. ROUX.

Mr. Buchanan moved that a certain award between the parties be made a rule of Court.

Order granted.

DU PLESSIS V. SHUTER.

Mr. Searle appeared for the applicant and moved for the removal of the trial of this action to the Circuit Court at Colesberg. The respondent consented to such removal.

Order granted.

PETITION OF ALFRED PATRICK MAGUIRE AND CAROLINE GEORGINA SKINNER.

Mr. Buchanan moved for leave to the parties to enter into a post-nuptial contract.

Granted on the usual terms.

IN THE MATTER OF THE CAPE COLONISATION COMPANY, LIMITED, IN LIQUIDATION.

Mr. Searle, Q.C., presented the report of the official liquidator, which was ordered to lie at the liquidator's office for fourteen days.

ROBERTS V. FRASER.

This was an application for an interdict restraining respondent from molesting or interfering with applicant while in lawful occupation of certain house and premises leased by her from respondent.

Mr. McGregor for the applicant.

Mr. Close for the respondent.

The application was postponed until March 22, the respondent undertaking not to molest the applicant in her tenancy of the house until then.

LAWRENCE V. CAPE TOWN TOWN COUNCIL. { 1898. March 14th.

Municipal regulations—Contravention — Name-plate — Onus of proof—Magistrate's jurisdiction.

A Municipal Regulation prohibited the placing of any obstruction or projection against, or in front of any house or building, without the sanction of the Corporation. The appellant having erected a name-plate above the stoep of the premises which he occupied, objected to the jurisdiction of the Magistrate to try him for contravention of the regulation on the ground that the stoep was his private property, and that rights in future would be bound.

Held, *that the onus of proving his ownership lay upon the appellant.*

This was an appeal from a decision of the Resident Magistrate of Cape Town. On March 4 last the appellant Lawrence, who is the manager of Lloyd & Co., was charged with contravening regulation 161 of the Cape Town Town Council by erecting a name-plate on certain premises at 40, Burg-street, without the permission of the Town Council. Mr. Moore, who appeared for the accused, excepted to the jurisdiction of the Magistrate in the case on the ground that the stoep above which the name-plate was erected was private property, and that rights in future would be bound. The exception was overruled by the Magistrate. No evidence was led to prove the ownership of the stoep. The Magistrate found the defendant guilty, and fined him 5s. Against this decision the present appeal was brought.

Regulation 161 was in the following terms: "The Corporation may give notice to the owner or occupier of any house or building to remove or alter any porch, shed, stoep, projecting window, cellar-door, step, cellar, sign, signpost, sign-iron, show-board, shutter, wall, gate, or fence, or any other obstruction or projection erected or placed against or in front of any house or building, where such projection or obstruction extends beyond or in front of the general line of building frontage as defined, pursuant to Regulation 159, and such owner or occupier shall within fourteen days after the service of such notice, remove such obstruction or projection, or alter the same in such manner as the Corporation may direct, and in default shall be liable to a penalty, &c., &c. . . . Any person placing or erecting any obstruction or projection against or in front of any house or building without the sanction in writing of the Corporation, under the hand of the Town Clerk, shall be liable to the penalties herein provided, and the Corporation may forthwith remove such obstruction or projection at the cost of such person."

Regulation 162 was as follows: "The Corporation shall not sanction any obstruction or erection which shall encroach upon the public way except upon conditions herein set forth, namely:" (Here followed conditions relating to various obstructions respectively, amongst them being overhead lamps, sign-plates and poles.)

Mr. Innes, Q.C., appeared for the appellant.

Mr. Searle, Q.C., for the respondents.

Mr. Innes: No. 161 of the regulations must be read with No. 162. The Council cannot prosecute under the second part of No. 161: it is clearly *ultra vires*; if a person hangs something up over his own ground and not over a street he cannot be prevented. The regulations are framed under section 170, sub-section 9, of Act 26 of 1893; this clearly refers to anything on the street.

[De Villiers, C.J.: If the stoep is open to the public cannot anything hanging be ordered to be removed on the ground that it is dangerous?]

The stoep is not a continuous footway and only such people as come to the appellant's premises could possibly be injured, that is, licensees only. The record is not explicit as to there being a right of way for the public. We have had no notice to remove. *Bruce* v. *Town Council* (9 Juta, p. 8) and *Lawley* v. *Town Council* (9 Juta, p. 8) were decided under the old regulations; it was there held that the Council had control of the thoroughfares.

Mr. Searle: The onus of showing that the stoep is private property lies on the respondent. No evidence was called on this point. *Jones* v. *Town Council of Cape Town* (13 S.C.R., p. 43).

[De Villiers, C.J.: Would the Magistrate have had jurisdiction to decide the ownership?]

I submit that he has in a case of this nature; this is not a civil case. A mere allegation of ownership by appellant is not sufficient to oust the jurisdiction; it was not a *bona fide* defence.

Mr. Innes: We did not call evidence of ownership because the Council lulled us into quiescence by putting in the respondent's letter claiming ownership. This being a criminal case the onus of proving that the stoep is a public way lies on the Council.

De Villiers, C.J., said: It is unnecessary for the Court to decide on the construction of this 161st Regulation, because the appellant had contravened the regulation by erecting this plate in front of the house, or in front of a building facing the street, and that is clearly what is meant. The defence raised was that this stoep belonged to the appellant, and that the projection was over the stoep, but, in my opinion, it lay upon the appellant to prove that. Upon the evidence the Magistrate was justified in holding that the ownership of the stoep was not in appellant. The appeal must be dismissed, with costs.

Buchanan, J., concurred.

[Appellant's Attorneys, Messrs. W. E. Moore & Son; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (in Chambers).]

FRANCISCUS V. FRANCISCUS. { 1898. March 22nd.

The Registrar reported that in this action, which was one in which a decree of divorce had been granted and a division of the joint estate ordered, the official receiver made certain recommendations regarding the distribution of the property. The defendant had offered to pay £300 in full satisfaction of the plaintiff's half share, and also undertook to pay all the debts proved against the estate. Under the circumstances the receiver suggested that the offer be accepted.

The offer was confirmed.

ROBERTS V. FRASER.

This was an application for an interdict restraining respondent from molesting or interfering with applicant while in lawful occupation of certain house and premises leased by her from respondent.

The petition of the applicant set forth that she kept a boarding-house at the premises situated at 104, Sir Lowry-road, which she occupied under lease from the respondent, J. I. Fraser. The lease commenced in October, 1897, and expired on October 1, 1898, with the right of three months' notice on either side. The rent was paid monthly and had been paid up to the end of February, 1898. The respondent was desirous of breaking down the house and had made several attempts to get petitioner out of it. He had already broken down the kitchen chimney and the garden fences, and cut off the water supply to the garden.

A letter had been received from the City Engineer under date March 8, 1898, stating that the house was unfit for habitation, being in a dangerous state. For the petitioner, it was contended that the house was in a dangerous state owing to the action of respondent's workmen.

For the respondent, it was denied that there was any lease in existence, the house being let at a monthly rental, and the tenant being subject to a month's notice to quit, which had been duly given. It was admitted that in September, 1897, a lease was entered into letting the premises for twelve months at a monthly rental of £12, but shortly afterwards, it was alleged, this lease was cancelled, and the rent reduced to £9 10s. per month, petitioner giving up a portion of the premises, including a coach-house, stable, &c. It was also stated that the house was being pulled down to comply with the Town Council regulations.

Mr. Buchanan for the petitioner.

Mr. Close for the respondent.

After argument,

Mr. Justice Buchanan said: This is an application for an interdict by Mrs. Roberts to prevent Fraser from pulling down the house she occupied. Mrs. Roberts alleged that she held possession of that house under a lease for twelve months, while Fraser asserted that she was only a monthly tenant, and that he had given her a month's notice from the month of February last, and that consequently she had no longer any right to remain in possession. This dispute as to the facts could not very well be settled on affidavits, but as the matter was again presented to the Court, Mrs. Roberts was strongly supported by the document, whereby she agreed to rent the house from Fraser for twelve months. That document, which bore a £5 stamp, which had been cancelled, showed that by one of the parties at least the lease was looked upon as being in force. With that written document before him he must say that *prima facie* the applicant had right on her side. Fraser admitted the drawing up of this document, but said it was intended to be only provisional, and that it was subsequently cancelled, and that a new agreement had been entered into at a reduced rent. The reduction of the rent need not necessarily cancel the other conditions of the lease and Mrs. Roberts explained how that had come about. With regard to the Town Council, if the Town Council had a right to pull down the house, an interdict would not interfere with that; the interdict was only as between applicant and respondent. At present applicant seemed entitled to the undisturbed and free right to use those premises, and the respondent had no right to interfere. He might bring an action for ejectment, but he had no right to take the law into his own hands. The application would be granted, with costs. If Fraser brought an action for ejectment, he might apply for the costs of the present application to be costs in the cause.

[Applicant's Attorney, J. Ayliff; Respondent's Attorney, Gus Trollip.]

Ex parte TRINITY CHURCH, PORT ELIZABETH.

Mr. Molteno moved, on behalf of Mr. Hewitt, who had been regularly appointed by the congregation of Trinity Church, Port Elizabeth, to appear as petitioner in the case, and to have certain resolutions of the congregation carried into effect providing for the appointment of the Bishop of Graham's Town, for the time being, and two churchwardens of Trinity Church, for the time being, as trustees or trustees in respect to the land on which the said church is built. The land in question was transferred to the Church on January 1, 1895, and three trustees were appointed, all of whom had since died.

The order was granted.

WITTE V. WITTE.

This was an application by Wilhelmina Witte for a temporary interdict restraining her husband, to whom she was married in community of property in July, 1894, from alienating certain property in the joint estate pending the result of an action to be brought by her against the said Herman Witte for separation and aliment, on the grounds of his drunkenness and his cruelty towards her. Also to pay her the sum of £30 for costs, to enable her to proceed in the matter.

A rule *nisi*, to operate as a temporary interdict, was granted in terms of prayer one, with leave to the respondent to have it removed. No order was made as to the second prayer.

In re CO-OPERATIVE BAKING COMPANY, IN LIQUIDATION.

Mr. Buchanan applied on behalf of the liquidator in the above estate for the temporary appointment of John Howard Cosnett as liquidator during applicant's absence in Europe. Applicant was obliged to leave for Europe for six months.

The order was granted, Mr. Cosnett to give the same security as the present liquidator.

BROWN V. BROWN.

Mr. Close appeared for the applicant in this matter, and moved for leave to applicant to sue for divorce *in forma pauperis*. He stated that it was impossible for the applicant to follow the usual rule and make personal application. She was living at Mossel Bay. The parties had been married for twenty-five years.

The application was refused. Mr. Justice Buchanan saying he was not inclined to depart from the rule that personal application should be made. The petitioner could make application to the Circuit Court.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN.]

REVIEWS.

1898.
April 12th.

Mr. Justice Buchanan said: Two cases have come before me for review, as judge of the week, from Special Justices of the Peace. One is under the Masters and Servants Act, a person being charged with absenting himself from his master's service without lawful leave or excuse. The man was found guilty, and sentenced properly. But the Special Justice of the Peace further ordered the man to return "to the master's service until due notice be given." This part of the sentence must be struck out, as there is no authority given in the Act to order a servant to return to his master's service. The other case was under the Police Offences Act, a policeman being charged with being drunk at or near a shop at Laingsburg. The prisoner pleaded not guilty, but being found guilty, was sentenced to be suspended from position or office and to find security to keep the peace. Neither of these sentences comes within the punishment provided by the Act for this offence and they must be quashed.

PROVISIONAL ROLL.

HENDRICKS V. VINK.

Mr. De Waal applied for the final adjudication of the defendant's estate.

Order granted.

KOENIG AND CO. V. MANNING AND CO.

Mr. Buchanan applied for the final adjudication of the defendant's estate.

Order granted.

MCLEOD V. CARSTENS AND CO.

Mr. Close applied for the final adjudication of the defendants' estate.

Order granted.

ASHLEY V. BARNES.

Mr. Ashburnham applied for provisional sentence on an acknowledgment of debt for £258 7s., less £190 paid on account.

Granted.

COLONIAL ORPHAN CHAMBER V. MATHERS AND ANOTHER.

Mr. Close applied for provisional sentence for £263 14s., being interest on a mortgage bond.

Granted.

ZOER'S ESTATE V. BOSMAN.

Mr. Close applied for provisional sentence on a promissory note for £175, with interest.

Granted.

THE MASTER V. BROWN.

Mr. Sheil applied for an order calling upon the defendant to file an account of the estate of which he is executor, and pay costs *de bonis propriis*.

The order was granted.

KOCH V. JACOBS.

Mr. Buchanan applied for provisional sentence for £143, due by the defendant under the conditions of sale of certain property, with interest from March 23, 1897.

Granted.

ILLIQUID ROLL.

MCAFEE V. MCAFEE'S EXECUTOR.

Mr. Ashburnham applied under Rule 329 for an order on the defendant to file an account in the estate.

Order granted calling on defendant in his capacity as executor to file a proper account within one month from date.

LOGAN AND CO. V. RAYNER.

Mr. Buchanan applied for judgment, under Rule 319, for the sum of £726 18s. 10d., due for goods sold and delivered.

Granted.

ALTSCHUL V. BRODIE.

Mr. Close applied for judgment, under Rule 329, for £26 7s. 2d., goods sold and delivered, and for money lent.

Granted.

MOMSON V. HOSKING.

Mr. Close applied for judgment, under Rule 329, for £50, being the amount of guarantee in connection with the sale of certain property.

Granted.

BRITISH AND TRANSVAAL FINANCIAL COMPANY V. THE SOUTH AFRICAN SALTPETRE-FIELDS.

Mr. Molteno applied, under Rule 329, for judgment for interest at 8 per cent. upon certain sums amounting to £2,000, and for an order that certain property, specially hypothecated, be declared executable.

Granted.

ROSS V. DURR.

Mr. Molteno applied, under Rule 319, for judgment for £2 14s. 5d., the unpaid balance of an account for £354 5s.

Granted.

KRAMER V. BLANCKENBERG.

Mr. Buchanan applied for judgment, under Rule 319, for a sum of £172 14s. 1d., goods sold and delivered.

Granted.

VAN ZALINGEN V. PANDY.

Mr. Buchanan applied for judgment, under Rule 329, for a sum of £700, being the purchase price of a certain property, with interest at the rate of 6 per cent. from December 6, 1897. Plaintiff tendered transfer of the property on payment of the amount due.

Granted.

WALKER V. TRUTER'S EXECUTORS.

Immovable property—Execution.

Order for attachment of immovable property in execution granted simultaneously with judgment, a return of nulla bona *having been made to a previous execution by another judgment creditor.*

Mr. Innes, Q.C., applied for judgment under Rule 329 for £328 13s. 8d., less £100 paid on account, being professional fees, disbursements and witnesses' expenses. Leave was also asked to attach certain moneys in the hands of the Sheriff, and certain landed property registered in the name of one of the defendants, in his capacity as executor. There had already been a return of *nulla bona* to an execution by another judgment creditor. Of the original amount £170 was claimed for fees and £54 for witnesses' expenses.

Judgment and the order, as prayed, were granted.

GAVIN AND ANOTHER V. OUDTSHOORN TOWN COUNCIL.

Mr. Searle moved for judgment in terms of a consent paper. An interdict had been obtained in this matter relating to a certain aqueduct in November last, but the parties had now come to the arrangement embodied in the consent paper.

Judgment was entered accordingly.

PARKER V. MATCHAM.

Mr. Maskew applied, under Rule 329, for judgment for £27 5s., rent due by defendant.

Granted.

ADMISSION.

Mr. Close moved for the admission of Pieter Jacobus du Toit as an attorney and notary, and asked that the oaths might be taken before the Resident Magistrate of Worcester.

Order granted.

REHABILITATIONS.

Orders for rehabilitation were granted in the cases of Andries François Marais and William Robert Kenneth.

GENERAL MOTIONS.

IN THE ESTATE OF THE LATE JOHANNES ALBERTUS LAUBSCHER, SEN.

Mr. Close applied for payment out of the estate of a certain sum of money towards the education of the minor children of Anna Maria Brink (born Laubscher).

An order was granted in terms of the Master's report.

IN THE INSOLVENT ESTATE OF HENRY CHARLES POOLE.

Mr. Searle applied that a rule *nisi*, granted by Mr. Justice Maasdorp, restraining the insolvent and his wife from removing cerain furniture, which had not been attached at the same time as the other property in the estate owing to the messenger being under the impression that it was the property of Mrs. Poole, be made absolute.

Rule made absolute, costs to be costs in the cause.

IN THE MATTER OF THE MINOR WILLEM JACOBUS MOOLMAN.

Mr. Close applied for leave to sell and transfer certain land.

Order granted in terms of the Master's report.

HOCHFELD V. SUTHERLAND LICENSING COURT. { 1898. April 12th.

Licensing Court—Absence of applicant for renewal—Notice of objection—Act 28 of 1883, section 48.

Where the holder of a bottle-store licence made a written application for a renewal at the annual meeting of the Licensing Court, but having no notice of any objection did not attend at the meeting, and the licence was refused on an objection taken by the members of the Court,

Held, *that the resolution of the Licensing Court should be rescinded, and the application referred back to them for reconsideration.*

Mr. Innes, Q.C., applied on behalf of Mrs. Hochfeld that the proceedings of the Sutherland Licensing Court, held on March 2, 1898, at which she applied for a renewal of a bottle-store licence, be reviewed, and that the proceedings of the Court, so far as the refusal was concerned, be set aside. The petition of the applicant showed that she had been for many years the owner of a bottle-store, and that she made written application to the last Licensing Court as by law required for a renewal of that licence. As in previous applications she did not attend the Court, either personally or by an agent. The licence was refused, although she had no idea any objection would be taken, nor was any notice given to her that any objection was to be taken. If her application were not granted, there would be only one licensed place in Sutherland, the hotel kept by Mr. Muller, and she would be greatly prejudiced. It appeared that no objection had been made by the outside public, but that the licence was refused on the motion of one of the members of the Licensing Court, who thought that one licensed place was enough for the village.

Mr. Innes: The provisions of Act 28 of 1883, section 48, were not carried out: that requires that information of the objections shall be given to applicant. *Barnett* v. *Licensing Court of Namaqualand* (8 Juta, p. 231). There is nothing compelling applicant to appear in person. Section 53 deals with objections by the public. Two days' notice must be given, and the consideration of the matter may be adjourned.

Buchanan, J.: This is an application for an order to rescind a resolution of the Licensing Court of Sutherland refusing the application of the applicant for a renewal of a licence which she had previously held. No objection was taken by the outside public to the renewal of this licence, but an objection was raised by the members of the Licensing Court themselves. It was quite competent for the members to raise an objection, but the 48th section of Act No. 28, 1883, requires that when an objection is so taken, the Court shall inform the applicant, and shall adjourn the further consideration of the application, should the applicant so request, for any period not less than four days, in order that the person affected by such objection may be offered an opportunity of replying thereto. It may well be supposed that the applicant would in most instances be present at the meeting of the Licensing Court, and could there and then receive notice, and if desirous to do so, could then apply for the postponement of the meeting for the purpose of answering the objection which had been taken. In this case the applicant was not present at the meeting, and no notice was given her of the objection taken. The Act does not specifically require applicants to be presented at meetings of the Board, but it does give them the right of being heard when objections are taken. Under these circumstances the resolution refusing the licence will be rescinded and the application referred back to the Licensing Court for reconsideration. This is not to say that the Licensing Court is bound to grant the licence, but after hearing the answer of the applicant it may reverse its decision, or it may not.

[Applicant's Attorneys, Messrs. Montgomery Walker & Jacobsohn.]

ADAMS V. TULBAGH LICENSING COURT.

1898. April 12th.

Licensing Court—Act 25 of 1891, section 13.

This was an application to set aside the proceedings of the Tulbagh Licensing Court held on March 2, 1898, so far as concerned the grant of a retail licence to one Jacobus Marthinus de Wet. The respondent made an application to the Court for a new retail licence for certain premises. When it came before the Court the Resident Magistrate of Tulbagh certified that only ten out of sixty voters entitled to sign the memorial had done so, and that consequently it was not signed by the majority of voters as by law required. Notwithstanding that, the Licensing Court granted the application, the Resident Magistrate voting against it on the ground of its illegality.

Mr. Innes, Q.C., appeared for the applicant.

Mr. Innes said that the Municipality was not divided into wards, and Act 25 of 1891, section 13, required the memorial in that case to be signed by a majority of the Divisional Council voters in the whole Municipality.

Mr. Justice Buchanan said: This application is well founded, for it is not competent for a Licensing Court under the local option clauses of Act No. 25 of 1891 to grant a new licence without a memorial signed by a majority of the voters in the district. It is not a question for the exercise of the discretion of the Licensing Court, but they are prohibited by law from doing so unless the majority of voters ask for it. In this case the new licence had been granted without the requirements of the law having been complied with. The application will be granted, with costs against De Wet.

[Appellant's Attorneys, Messrs. Montgomery Walker & Jacobsohn.]

CAPE TOWN AND GREEN POINT TRAMWAY COMPANY.

Mr. Searle, Q.C., applied for an order directing that the said company be wound up under the provisions of the Companies Act of 1892, and for the appointment of Edward Ridge Syfret as official liquidator.

Order granted.

PARKIN V. SMALL.

Mr. Buchanan applied for leave to attach certain land to found jurisdiction, and for authority to sue by edictal citation for judgment for £415, with interest at the rate of 10 per cent., on a certain mortgage bond. The defendant was residing at Boksburg.

The order was granted, but the Court directed that personal service should be made.

ESTATE OF THE LATE FRANS PETRUS JACOBUS MOCKE.

Mr. De Waal applied for leave to the executrix in the estate to raise £120 on the property for the purpose of effecting necessary repairs.

The order was granted.

ESTATE OF THE LATE JOHN DAVID BECKMANN.

Mr. Buchanan appeared for the petitioner, and moved for leave to the Registrar of Deeds at King William's Town to transfer certain property wrongly described.

The consent of all the parties interested having been obtained, the order was granted

INSOLVENT ESTATE OF THE LATE JACOB OLIVIER VAN DER MERWE.

There were two applications in this matter both for the appointment of a trustee in the insolvent estate, with full powers to liquidate the estate. A second meeting of creditors in the estate had been held before the Resident Magistrate of Richmond, at which a trustee could not be appointed, owing to the one gentleman proposed having the majority in numbers of the creditors and the other the majority in value.

Mr. Searle, Q.C., applied on behalf of several creditors for the appointment of Walter Parke Cressy, who had the majority in numbers.

Mr. Rose-Innes, Q.C., applied on behalf of several other creditors for the appointment of Abraham Pieter de Villiers, who had the majority in value, or if the Court should think fit, of Mr. G. W. Steytler, secretary of the Colonial Orphan Chamber and Trust Company.

The applicants objected to the appointment of Mr. De Villiers, on the ground that he held a preferent bond, which it might be desirable to investigate, to see that it did not give undue preference.

The respondents objected to the appointment of Cressy, on the ground that he was not a creditor and had no interest in the estate, and further might involve the estate in useless litigation.

After hearing counsel,

Mr. Justice Buchanan said: The law commits to the creditors the choice of a trustee, who shall administer and wind up the estate, but requires that the trustee shall be elected by the creditors, who have a majority of the votes in number as well as of value. In this case on each side there were three creditors entitled to vote as far as number was concerned. There was thus an equality in number for each candidate, and a majority in value in favour of Mr. De Villiers. On the other hand, it was said that Mr. De Villiers though the largest creditor had interest opposed to those of the other creditors, and that he had a preferent bond over the estate which might be challenged. It is impossible to say now whether or not the said bond could be successfully challenged. Mr. De Villiers alleges that there is very little difference between his proof and what was objected to. However, in this case, I think it desirable that neither Mr. Cressy nor Mr. De Villiers should be appointed, but that an outsider should be the trustee. The majority of the creditors are in favour of Mr. Steytler as an alternative. The Court will therefore appoint Mr. Steytler as provisional trustee, with full power to wind up the estate. As to costs, the usual course will be followed, and the costs come out of the estate.

LOUWRENS V. WORTLEY.

Mr. Buchanan applied for leave to sign judgment against plaintiff for not proceeding with the action.

Order granted.

MORGAN V. HIDDINGH.

This was an application for leave to attach certain property to found jurisdiction, and for authority to sue by edictal action.

For the petitioner, it was alleged that in February last she was in the employ of the respondent as nurse to his minor son, and was struck and assaulted by respondent's wife. She took out a criminal summons, and also demanded damages for the assault. Before the return day respondent made preparations to leave the Colony with his family, and petitioner threatened to have steps taken to prevent him. Respondent prepared to embark on the Scot on March 9, and made a proposal for an amicable settlement of the case, undertaking to pay the petitioner the sum of £27 and all costs. An arrangement was made for a meeting at his attorney's office in the afternoon, but respondent did not turn up, and could not be found as he hid himself on board the ship. It was now sought to attach the interest on a certain inheritance he had in this colony to found jurisdiction.

Mr. Molteno appeared for the petitioner.

The Court granted leave to attach the sum of £60 of the interest, not the principal, of the inheritance, for the purpose of founding jurisdiction, and to sue by edictal citation, the citation to be returnable on May 2, leave also being given to serve notice of trial at the same time.

IN THE MATTER OF JOHANNES MARTHINUS MARAIS.

Mr. Joubert applied for a rule *nisi* calling upon respondent to show cause by the first day of the May term why he should not be declared insane and a *curator ad litem* appointed.

Granted.

PETITION OF JOHANNA CHRISTINA SMIT.

This was an application by petitioner for leave to sell and transfer certain landed property without the assistance of her husband, whose whereabouts is unknown, he having deserted her in 1889, and she having never since heard of him or from him. Petitioner now resided at Maitland, and the property which she desired to sell is situated at Hanover.

Mr. Buchanan for the petitioner.

An order was granted as prayed, and the Registrar of Deeds authorised to pass transfer.

GAMAT ABBAS AND ALIE BEHARDIEN.

This was an application for an order for ejectment against certain persons.

Applicant's affidavit showed that he was entitled to the free use and undisturbed occupation of a house at 13, Lewis-street. The two respondents were his sons, and had, with their wives and families, lived with him since the death of his first wife, respondents' mother. He alleged that their conduct had become intolerable, and it was impossible for him to live with them. He therefore wished them turned out.

The respondents' affidavits said that the rows were caused through petitioner's second wife. They claimed a right to remain in the said house so long as they allowed petitioner to remain.

Mr. Molteno for the applicant.

Mr. Close for the respondents.

After hearing counsel,

Mr. Justice Buchanan said: The Court will not as a rule grant an ejectment on motion, but I think this case is one not so much as one of ejectment, as of trespass by respondents. The applicant has shown the Court beyond dispute that he is entitled to the possession of this house, and the free use and enjoyment thereof. The respondents came into the house with the petitioner's permission, and they now refuse to leave. No order will be made to eject respondents, but I think the Court should interdict them from further trespassing on the premises, and from interfering with the free and undisturbed use of the house by petitioner. It is clear they had no right to be in the house, and the applicant has the sole right of possession. He gave permission to these people to come in, but he now withdraws the permission, and they can no longer interfere with him. Judgment will be given accordingly.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorneys, J. Ayliff.]

ESTATE OF THE LATE WILLIAM HEATH.

This was an application for leave to the widow to appraise and take over the property of the estate upon securing the minors' inheritances, or otherwise to raise a certain sum of money on mortgage.

Mr. Buchanan for the applicant.

The Master in his report suggested that the best course would be to allow the widow to take over the estate on securing the children's portion by first mortgage on the property, or, should she prefer it, by paying the money into the Guardians' Fund.

An order was granted in terms of the Master's report.

THE UNION BANK, IN LIQUIDATION.

Mr. Innes, Q.C., presented the ninth and final report of the Union Bank (Limited), in liquidation.

The usual order for publication was made.

THE CAPE COLONISATION COMPANY, IN LIQUIDATION.

Mr. Searle, Q.C., presented, for confirmation, the report of the Cape Colonisation Company (in liquidation). Debts amounting to £1,281 12s. 6d. had been proved and recognised by the liquidator, but owing to large claims for £11,900 made by persons in London styling themselves debenture holders the liquidator wished to investigate these claims more fully, and had not yet been able to distribute anything except those claims ordered by the Court. He asked for an order from the Court fixing a date for the final report.

The report was confirmed, and June 12 fixed as the date for the final report.

PENTZ V. PENTZ.

Mr. Jones appeared for the applicant, and applied for a decree of divorce. An order had been granted on February 10, 1898, for restitution of conjugal rights, and ordering respondent to return to petitioner by March 31, failing which to show cause by April 12 why divorce should not be granted, and why petitioner should not have custody of the child of the marriage, and respondent pay £2 per month towards its maintenance until it reached the age of sixteen years.

Affidavits of service of the order were put in, and counsel stated that an arrangement had been made with defendant's attorneys whereby the plaintiff agreed to take £1 per month instead of £2 until the child reached the age of sixteen years.

A decree of divorce was granted, plaintiff to have custody of the child, and defendant to pay £1 a month towards its maintenance until it reached the age of sixteen years.

IN THE MATTER OF THE MINOR JACOBUS ADRIAAN LOUW.

Mr. De Waal appeared for the applicant, the tutor dative, and applied for leave to sell or mortgage certain property.

An order was granted in terms of the Master's report authorising the sale of that minor's portion of the property by public auction.

THE CO-OPERATIVE BAKING COMPANY, LIMITED, IN LIQUIDATION.

Mr. Buchanan presented the first report of the liquidator.

The usual order was made.

TILL AND CO. V. BECKELL.

Mr. Close applied for leave to sign judgment against plaintiffs for not proceeding with their action.

Order granted.

THE ALIWAL NORTH BOARD OF EXECUTORS, IN LIQUIDATION.

Mr. Molteno presented the fourth and final liquidator's report, and asked that an order be made for publication.

The usual order for publication was made.

IN THE ESTATE OF THE LATE EDWARD JOHN MCGIBBON.

Mr. Sheil applied for an order authorising the Master to pay to the executor a sum of £100 to assist in defraying the education and maintenance of the minor children.

The order was granted in terms of the Master's report.

IN THE INSOLVENT ESTATE OF JAN FOURIE.

Mr. Innes, Q.C., apppeared for the applicants, and applied for an order appointing George Frederick Dall as sole trustee, with power to liquidate the estate.

Mr. Searle, Q.C., appeared for the respondents and opposed the application. The respondents, Messrs. Mortimer & Co., wished the appointment of Walter Park Cressy as trustee.

In this instance there was an equality of creditors in numbers, and Mr. Dall had a majority in value.

After hearing counsel, Mr. Justice Buchanan said that if it had been a large estate he would have been inclined to appoint both as trustees, but under the circumstances he considered it best for the creditors to appoint Mr. Dall as provisional trustee, with power to finally administer the estate; costs to come out of the estate.

MILLS V. BARKER AND ANOTHER.

Mr. Searle applied for leave to attach a certain legacy to found jurisdiction, and for authority to sue by edictal citation.

The affidavits showed that it was intended to sue Joseph Barker and his wife, Emma Sophia Barker, for £200 on a promissory note. The parties formerly lived at Uitenhage, but were now resident in Natal.

As it appeared that the legacy was vested in Emma Sophia Barker in her own right, Mr. Justice Buchanan pointed out that jurisdiction could only be founded against her.

An order was granted attaching the interest of Emma Sophia Barker to found jurisdiction against her. Personal service was ordered with leave to apply again.

LEA V. BAUMKEN.

This was an application for dissolution of partnership, and the appointment of Mr. E. R. Syfret as receiver, with full powers to liquidate.

Mr. Innes, Q.C., for the applicant.

Mr. Close for the respondent.

The order was granted, costs to come out of the partnership.

BETHANIE V. BETHANIE.

Mr. Ashburnham applied on behalf of Alice May Bethanie for leave to sue *in forma pauperis* for a judicial separation from her husband, on the ground of his drunken and dissolute habits, and also because he failed to support her or the children of the marriage.

Petitioner said that she and the children were supported by her father, who worked for them. Her husband was at home and did no work.

Leave was granted.

CASES DECIDED IN THE SUPREME COURT,

CAPE COLONY.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

MAGISTRATE'S COURT CASE REVIEWED. { 1898. May 2nd.

Sentences passed by a Magistrate which were from their form concurrent made successive on review.

Mr. Justice Buchanan said: A case came under review before me from the Acting Resident Magistrate of Calvinia, in which the accused was tried on a charge of theft. A preparatory examination had been taken, and in that examination some evidence went to show that there had been some wheat obtained—the Magistrate said—on false pretences. But there were two horses also stolen, and the Attorney-General remitted the case on a charge of theft of two horses only, nothing being said about the charge of obtaining wheat on false pretences. Thereupon the Magistrate charged the prisoner on three distinct counts—one of theft of the wheat, the second of stealing one of the horses, and the third of stealing the other horse. The Magistrate found the prisoner guilty on all three counts, and sentenced him separately on each count, passing sentence of four months' hard labour on each. As the record stands these sentences would be concurrent, although it is apparent the Magistrate did not intend that. The conviction on the first count will be quashed, and the other sentences made successive instead of concurrent.

ADMISSIONS.

Mr. Schreiner, Q.C., applied for the admission of Mr. William Russell as an advocate of the Court.

The application was granted.

Mr. Innes, Q.C., applied for the admission of Mr. Arthur Joseph Barry as an advocate of the Court.

The application was granted.

Mr. Close applied for the admission of Mr. John Lawson Cameron as an attorney.

The application was granted, the oath to be taken before the Registrar of the High Court of Griqualand.

PROVISIONAL ROLL.

MARQUARD'S EXECUTORS V. DANIEL.

Mr. Maskew, for the plaintiff, moved that the provisional order of sequestration, granted by Mr. Justice Buchanan, be discharged.

Granted.

GIBSON V. WALKER.

Mr. McGregor applied for provisional sentence for £449 19s. 10d., with interest at the rate of 6 per cent., due on a promissory note.

Granted.

HERTZOG'S EXECUTORS V. MEIRING.

Mr. Ward applied for provisional sentence for £3,900, due on a mortgage bond, with interest at the rate of 5 per cent. from July 1, 1894, less £50 already paid on account of the interest.

Order granted; property declared executable.

LENNON AND CO. V. CUTLER AND ANOTHER.

Mr. Ashburnham applied for provisional sentence for £48 10s. 8d., on two bills of exchange, with interest from the due date.

Granted.

STEGMAN V. MULLER.

Mr. Schreiner, Q.C., applied for provisional sentence for £140, due on a promissory note, less £7 paid on account.

Granted, subject to the production of the certificate of presentation.

MAREE V. MAREE'S ESTATE.

Mr. McGregor applied for provisional sentence for £50, on a mortgage bond.

Granted; property declared executable.

ILLIQUID ROLL.

BELL V. LOCKE.

Mr. De Waal applied, under Rule 329D, for judgment for £80.

Granted.

ISAACS AND CO. V. G. G. SCHREINER.

Mr. Ashburnham applied under Rule 329D, for judgment for £130 6s., goods sold and delivered.

Granted.

VAN DER BYL AND CO. V. J. J. LOUW.

Mr. Ashburnham applied, under Rule 329D, for judgment for £15 13s. 6d., goods sold and delivered.

Granted.

COLONIAL GOVERNMENT V. HLUBI.

Mr. Sheil applied, under Rule 329D, for judgment for £816, with interest, being the balance of the purchase price of certain land, and failing the passing of a mortgage bond a declaration that the sale had been cancelled and the amount already paid (£204) declared to be forfeited.

Granted.

REHABILITATIONS.

Mr. Gardiner applied for the rehabilitation of Gert Venter.

Granted.

Mr. Close applied for the rehabilitation of Louis Lategan.

Granted.

Mr. Close applied for the rehabilitation of John Ingles.

Granted.

Ex parte ISENBERG. { 1898. May 2nd.

Rehabilitation.

The Supreme Court will not entertain an application for the rehabilitation of an insolvent whose estate has been sequestrated by the High Court of Griqualand, until certified copies of the proceedings in insolvency have been handed over to the Registrar of the Supreme Court.

Mr. Molteno applied for the rehabilitation of Simon Isenberg. He said that it had been discovered that the order of sequestration was granted by the High Court of Griqualand, and therefore all the papers had not been filed with the Master here. He therefore asked that the matter be allowed to stand over *sine die*, until they got copies of the said documents. He took it that there was nothing to prevent the insolvent applying to the Supreme Court for rehabilitation, as it had jurisdiction over all insolvencies.

De Villiers, C.J.: There would be nothing wrong in doing so, but at the same time the Court might prefer that it should be heard in the High Court, where the sequestration proceedings took place.

Mr. Molteno: It was only after notice to creditors had already been published that it was found that the original insolvency proceedings took place in the High Court. The trustees' report and the original schedules were not filed here.

De Villiers, C.J.: That shows that as a matter of practice the application should be heard in the High Court. It might possibly save expense to remove the case to the High Court now.

After further argument,

De Villiers, C.J.: The Courts undoubtedly have concurrent jurisdiction, but this Court will not undertake such jurisdiction except with all the information before us, and therefore if in future applications of a similar nature should be made, the Court will require that certified copies of the proceedings in insolvency be handed over to the Registrar of the Supreme Court for the information of the Court. In this case, as the papers have not been handed over, the Court has decided that it will be more convenient to remove the matter to the High Court.

GENERAL MOTIONS.

BETHANIE V. BETHANIE.

Mr. Ashburnham moved that the rule *nisi* for leave to sue *in formâ pauperis* granted in this case, which was an action for judicial separation, should be made absolute.

The rule *nisi* was made absolute, Mr. Ashburnham being appointed plaintiff's counsel and Messrs. Scanlen & Syfret attorneys.

BROWN V. BROWN.

Mr. Close moved that the rule *nisi* for leave to sue *in formâ pauperis* granted by the Chief Justice at the Mossel Bay Circuit Court, be made absolute.

The rule *nisi* was made absolute, Mr. Close being appointed counsel, and Messrs. Tredgold, McIntyre & Bisset, attorneys.

In re CRAWFORD. { 1898. May 2nd.

Attorney—Articles of Service.

The applicant having been articled in this Colony to an Attorney of the Supreme Court, served him for about a year and nine months, but upon the attorney leaving for Bulawayo to practise there the articles were duly transferred to another attorney in this Colony. After so serving within this Colony for two years and four months the applicant proceeded to Bulawayo and there served the attorney to whom he had been originally articled. The Court now granted his application that upon his passing the requisite examination in this Colony, eight months' service in Bulawayo might be allowed to count as part of the requisite three years' service.

This was an application for an order authorising the petitioner, Lindsay Balcarres Crawford, to complete his articles of service with an attorney in Bulawayo. The petition set forth that in April, 1895, Crawford entered into articles with Mr. P. Ross Frames, an attorney of this Court at Kimberley, the agreement being registered in July, 1895. On July 1, 1897, in consequence of Mr. P. Ross Frames giving up business and proceeding to Bulawayo, petitioner's articles were transferred to Mr. P. W. Mallett, another attorney of this Court in Kimberley. Petitioner served with Mr. Mallett until November 13, 1897, making his total service in the Colony two years and four months. Petitioner went to Bulawayo, and from December 4, 1897, had been in the service of Mr. P. Ross Frames. He prayed that the transfer to Mallett might be cancelled, and that he might be allowed to fulfil his articles with Frames at Bulawayo.

Mr. Schreiner, Q.C., appeared for the petitioner.

Mr. Searle, Q.C., opposed on behalf of the Incorporated Law Society.

Mr. Schreiner: I understand that the objection is taken that portion of the service was outside the jurisdiction. But service outside the jurisdiction at the commencement of the period has been allowed. *In re Lance* (1879, p. 78); *In re Johnson* (J. 1, p. 40); *Ex parte Craig* (J. 9, p. 295); *Ex parte Cameron* (Sheil 7, p. 83). Bulawayo is in the British dominions and comes specially under the jurisdiction of this Court, inasmuch as appeals from there can be made to this Court. Act 35 of 1896, sections 44-49; Matabeleland Order in Council, 1894, section 35.

The rules of procedure of the High Court of Bulawayo are the same as here. Act 12 of 1858 does not say that the service for five years mentioned must be in the Colony. Rule of Court 149 does speak of service within the Colony.

Mr. Searle: Service in Scotland and England has been allowed to count because full service in those countries entitle to admission here. In *Turnbull's* case (J. 3, p. 80) although there had been five years' service in England, the Court required a year's service here. There is no provision in our law for service in Matabeleland. The applicant can be admitted at Bulawayo since he has served there partly and partly in this colony. Legal Practitioners Regulations, 1895, section 2.

Mr. Schreiner in reply: The Court has the roll of attorneys here and could strike the applicant's name off in case of misconduct.

De Villiers, C.J.: The Incorporated Law Society were quite justified in appearing, in order that the question raised by this application may be fully discussed. There are precedents for allowing service under articles in England to count, but it is said that service in Matabeleland stands on a different footing. To some extent it does, but, in the present case, it appears that the attorney in Matabeleland to whom the applicant was articled was an attorney of this Court, that he has never been removed from the roll, and that he is the same attorney to whom the applicant had been originally articled and whom he served in this colony for the greater part of two years and four months. Considering that this Court is a Court of Appeal from the High Court of Matabeleland and that the law and practice of the two countries are almost identical, I am of opinion that eight months' service outside the immediate jurisdiction of this Court ought to be allowed to count as part of the required three years' service, it being understood that the requisite examination will be passed here.

Buchanan, J., said: The principle underlying the requirement of articles is, that proper instruction should be given to the clerk by a properly qualified attorney. The attorney in this case was a proper person when the applicant entered into his articles, and he still remains so. Though he has removed from the Colony this attorney is practising in a Court governed by the same laws and rules as is this Court, and moreover is still on our rolls. The fact that this Court has appellate jurisdiction over Rhodesia is also a strong point in applicant's favour. The requirements for proper instruction are fully met by the circumstances set forth in the petition.

Maasdorp, J., concurred.

Application granted accordingly.

[Applicant's Attorneys, Messrs. Findlay & Tait; Attorneys for the Law Society, Messrs. Van Zyl & Buissinné.]

KAFFRARIAN COLONIAL BANK, IN LIQUIDATION.

Mr. Buchanan applied for an order dissolving the company and disposing of the books. The liquidation had now been finally completed.

The order was granted, the books to remain in the possession of the liquidators, as at present, for six months and then to be destroyed.

TAYLOR V. TAYLOR. { 1898. May 2nd.

This was an action at the suit of Mrs. Taylor for restitution of conjugal rights and forfeiture by the defendant of all benefits derived from the community of property.

Mr. Searle, Q.C., for the plaintiff.

R. D. H. Barry, clerk in charge of the Marriage Register in the Colonial Office, produced the certificate of the marriage of Anna Louisa Shilling to Charles C. M. Taylor, at Kimberley, on January 12, 1882.

Anna Louisa Taylor stated that she was married to defendant at S. Cyprian's Church, Kimberley. After marriage they lived together for three years at Kimberley, her husband being then a partner with her brother in a soda-water manufactory. Afterwards her father set him up in business in the Commercial Hotel, and she lived there with him for some time. While she was living there she became ill, and with her husband's consent went to her mother's house, where he visited her several times. Witness's father closed the Commercial Hotel, but her husband remained in Kimberley. When she recovered from her illness, however, she found that he had left Kimberley. Witness did not hear where he had gone. She heard of him after that in 1892, when her father died. She was in Johannesburg, and heard that he was in Pretoria. Witness did not see him, and took no steps to get him back to her. After that witness went to England, remaining there two years, and on her return to this country she went to live with her sister at Rondebosch. While in England she heard from Dr. Jameson that her husband was in Rhodesia. They were married in community of property. Her husband had no property whatever. Witness was entitled to money on her mother's death.

The Court granted a decree of restitution of conjugal rights on or before June 15, failing which a rule calling upon defendant to show cause by July 15 why a decree of divorce should not be granted, with forfeiture of the benefits of the community of property.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné.]

ESTATE OF THE LATE FRANCIS JOHANNES LOMBARD.

Mr. Buchanan applied for leave to raise by mortgage on the property in the estate a sum of £1,825 6s. 11d., to meet claims against the estate. The heirs were all majors, and had signified their consent to this course.

Order granted.

HAARHOFF AND OTHERS V. SMITH AND OTHERS.

Mr. Searle applied for leave to sue by edictal citation in an action to be brought by the applicants, Messrs. Haarhoff, Michau, and others, of Kimberley, against Smith, who resided at Willowmore, and Gerber, who was now in the Free State, but was domiciled in the Colony. The action arose out of the purchase of certain farms by applicants from respondents, one of the conditions of the purchase being that the farms were to be free from all liabilities; but plaintiffs had since discovered that there was a liability to the Colonial Government of £226 5s.

The order was granted. leave being also given to serve citation and intendit together.

VAN DER WESTHUIZEN V. VELENSKI.

This was an application to make absolute a rule *nisi* interdicting the sale of a certain farm in the Oudtshoorn district, pending an action to be brought by the applicant.

Mr. Innes, Q.C., for the applicant.

Mr. Searle, Q.C., for the respondent.

No order was granted. respondent undertaking not to alienate the farm pending the action to be brought; costs to be costs in the cause.

INSOLVENT ESTATE OF BEER AND CO.

Mr. Innes, Q.C., applied on behalf of the trustee in the insolvent estate for the appointment of a commissioner to inquire into the dealings and transactions of the insolvent.

Order granted, Mr. Molteno being appointed commissioner.

VAN AS V. NEL AND NEL. { 1898. May 2nd.

Costs—"All Costs."

Where the Court had ordered "all costs" to be paid out of a certain estate this was interpreted subsequently to include costs between attorney and client.

This was an application by Anna Magdalena As, a minor, assisted by her father, on notice to the respondents in their capacity as executors in the estate of the late Anna Magdalena Nel, asking for authority to attach all moneys due to the estate of the late Anna Magdalena Nel in the hands of the respondents as might be sufficient to pay a bill of costs, amounting to £144 0s. 6d., due by the said estate to the applicant.

The applicant set out in her petition that on the 1st December, 1896, she obtained a judgment against the respondents for £500, to be paid into the Guardians' Fund, with all costs, out of the estate. That the respondents' attorney had his bill taxed as between attorney and client, and filed such bill against the estate of the late A. M. Nel. That thereafter the applicant's attorney had his bill taxed as between attorney and client, and requested respondents to file the same against the said estate, but they refused to do so on the ground that these costs were not payable out of the estate. That the applicant thereupon took out a writ against the estate, to which a return of *nulla bona* had been made. That in consequence of the respondents' delay the applicant had suffered loss and damage through being sued for witnesses' expenses connected with the case.

The judgment referred to in the petition was given in an action for an account of a donation due to the applicant brought against Jacobus Johannes Nel individually, and against him and Pieter Jacobus Nel as executors (6 Sheil, p. 471); its terms were, "The Court grants absolution from the instance as regards defendant Nel personally, and judgment for plaintiff as against the executors of the estate of Anna Magdalena Nel for the sum of £500, to be paid into the Guardians' Fund, with all costs, out of the estate." The attorney for the respondents filed an affidavit setting out that after judgment applicant's attorney served on his firm a bill of costs amounting to £355 4s. 1d., but that on taxation about £168 19s. 9d. was disallowed. That thereafter the *allocatur* of the taxing officer was affixed and the bill paid on March 5, 1897. That about February 8, 1898, the applicant's attorney sent to his firm a further bill of costs, purporting to have been taxed as between attorney and client. That the said bill was wholly made up, as far as his recollection served, of the items disallowed from the bill originally paid by the executors. That the second bill was returned and the applicant's attorney informed that his clients refused to accede to his request to file the papers. That after demand a writ was taken out without any notice to the respondents, and a return of *nulla bona* made by the latter, as they did not consider that the estate was liable for the amount of the said costs, seeing that the applicant had been paid his costs in terms of the order of the Court.

The applicant's attorney filed a replying affidavit, in which he said that as the Taxing Officer had disallowed certain items in the bill of costs as between party and party, on the ground that they were not payable as between party and party, it was necessary to re-introduce them in the bill of costs as payable by the estate in terms of the order of Court; that notice was given to respondents' attorney, and as the latter refused to attend at the taxation the Taxing Officer proceeded with the taxation; that as the said attorney refused to meet him in any way in the matter. he had no other course than to issue a writ. He further said that payment had not been fully made in terms of the order of Court, inasmuch as taxed costs between attorney and client had not been paid.

Mr. Searle, Q.C., for the applicant.

Mr. Schreiner, Q.C., for the respondents.

Mr. Searle: It is a fair interpretation of the words "all costs" to say that they included costs between attorney and client as well as between party and party.

Mr. Schreiner: This application is in the nature of a review of the taxation. The bill of costs was originally taxed and paid and a year afterwards another bill is taxed. The proper course was a review at the time of the taxation. A fresh bill of costs should not be allowed now. The action was originally brought against one executor, J. J. Nel, solely and in his individual capacity: at the suggestion of the Court the other executor was joined and they were sued as executors. The original costs were therefore incurred by J. J. Nel. When the Court said "all costs," that meant that these original costs should be included. If costs between attorney and client were intended that would have been clearly stated

De Villiers, C.J.: At this distance of time it is difficult to say with any certainty what the intention of the Court was, but I have a very strong impression, and it appears it is also the impression of my brethren, that the intention of the Court was that the plaintiff should have the sum of £500 clear of all costs, and with that object the word "all" was inserted before "costs." I feel that the Court is justified now in giving such a construction to this order. The words "all costs" are not usually inserted, so I have the impression that it was meant to include the costs between attorney and client. This case has been complicated by the fact that the executor himself has charged his personal costs against the estate. Well, if he has done wrong, there would be a remedy—somebody would be entitled to sue. It was said that the Taxing Officer had passed the costs as between attorney and client; but the fact that the Taxing Officer had done so, does not mean a decision that he was entitled to those costs. We must decide this question upon the construction of the judgment, and I have the idea fairly constituted in my mind that the plaintiff was to have the costs between attorney and client, instead of these being deducted from the £500. The application will therefore be granted, with costs out of the estate.

[Applicant's Attorney, D. Tennant; Respondents' Attorneys, Messrs. Sauer & Standen.

MACELLI V. MACELLI.

Mr. Gardiner applied for leave to the petitioner to sue her husband *in forma pauperis* for divorce.

The petitioner, Maria Elizabeth Macelli, stated that she was married to the respondent, Jacobus Johannes Macelli, in 1891, and there was one child of the marriage. She left her husband five years ago on discovering that he had misconducted himself with one Christina Macelli. Her husband was in town, and petitioner was in service, earning £1 7s. 6d. per month. The child was with her parents, but she gave it food and clothing.

The application was referred to counsel.

LAWRENCE V. LAWRENCE.

Mr. Gardiner applied for leave to the petitioner, Sarah Lawrence, to sue her husband, Isaac Lawrence, *in forma pauperis*, for divorce. Respondent was tried at the Criminal Sessions, in April, 1894, for rape on Aledia Davids, and being found guilty, was sentenced to fifteen years' imprisonment.

The application was referred to counsel.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

QUEEN V. SOLOMON AND OTHERS. { 1898. May 3rd.

Conspiracy—Overt act—Crime or offence—Escape from custody—Act 23 of 1888, Section 29.

On the trial of prisoners for conspiring to escape from custody in contravention of the 29th section of

Act 23 *of* 1888, *proof of such conspiracy is sufficient without further evidence of any overt act or attempt in pursuance of such conspiracy.*

This was a case brought on review and reserved for argument by Mr. Justice Buchanan on a point of law. The prisoners were undergoing a term of imprisonment with hard labour, and were charged under section 29 of Act 23 of 1888 with having on March 6, near Prieska, unlawfully conspired with other prisoners to make their escape from the gaol. They were found guilty and sentenced each to an additional year's imprisonment, and to receive fifteen lashes. The evidence showed that the plan of the prisoners was to seize the guard while they were out working, throw him in the river, and then make off. The plan fell through, although one prisoner did actually make his escape, and had not yet been recaptured. The point reserved for argument was whether this conspiracy without any overt act was an indictable offence.

Mr. De Waal : for the prisoners. By common law no conspiracy is a crime without an overt act. *Regina* v. *Kaplan* (10 Juta, p. 265) : *Matthaeus* (1 Cap., section 5); *Boehmer* (Med., Art. 178): *Van der Linden* (p. 182). The words of the statute must be construed in conformity with the common law and therefore some overt act is required. Here there was no overt act following the mere intention. The conspiracy was not merely to escape, it was to drown the guard. The fact of one of the prisoners escaping was not an overt act in pursuance of the conspiracy. The prisoner escaped the day before the plan was to be put into execution ; the intention was abandoned.

Mr. Bisset, for the Crown, was not called upon.

De Villiers, C.J. : It is unnecessary to hear counsel for the Crown. In the case of *Queen* v. *Kaplan* (10 Juta, 259) the question whether mere conspiracy to commit a crime is indictable was fully considered, and it was decided that it is not a substantive offence except where the conspiracy is for the purpose of committing a crime against the safety of the State. At common law, therefore, the general principle is that, without proof of an overt act, mere conspiracy is not indictable. But the offence charged in the present case is a statutory one and the question to be determined is whether, under the 29th section of Act 23 of 1888, the prisoners were properly convicted of a conspiracy to escape from prison without proof that they made an actual attempt so to escape. Among the offences created by the section is that of a prisoner having in his possession any implement intended to aid his escape, but it is not contended that an attempt to use such implement should be proved before conviction. Why then should there be evidence of an attempt to escape in order to prove conspiracy? When once the prisoners had agreed upon a plan for effecting the escape of some or all of them the offence was complete under the section. If any of them afterwards withdrew from the plan that would be a strong ground for a purely nominal punishment, but it would not justify the view that no punishable offence had been committed. The Legislature appears to have considered it necessary to enact drastic measures for the enforcement of prison discipline, but if in the present case I were satisfied that the prisoners did repent before the time arrived for carrying out their plan I should certainly have recommended a remission of a portion of the severe sentence passed upon them. There is, however, no proof of such repentance. The plan was to drown the guard, and then escape, but one of the parties to the plan escaped without drowning the guard and the others were apparently taken aback and made no attempt either to drown the guard or to escape. There was a clear intention on the part of all of them to escape, but owing to fortuitous circumstances only one of them carried out his intention. Even if it were necessary to prove an overt act I am of opinion that the actual escape of one of them in pursuance of a conspiracy for the escape of all of them would constitute such an overt act. It is sufficient, however, to hold that there has been a conspiracy in terms of the Act and that the prisoners were rightly convicted.

Buchanan, J.: I reserved the point for the consideration of the full Court, because it appeared to me most dangerous to hold that crimes which rested in intention only should be rendered liable to severe punishment. Our common law requires, except in cases of treason, that some overt act should be done before a mere conspiracy becomes a punishable offence. But the Legislature has stepped in. and in the opinion of the full Court the common law has been altered by the Prisons' Management Act, so as to make a conspiracy to escape from gaol a substantive crime in itself, without any overt act being committed.

Maasdorp, J., concurred.

Convictions confirmed accordingly.

OCTOBER AND OTHERS v. ROWE. { 1898. May 3rd.

Master and servant—Refusal to resume service—Departure from service—Wages Remuneration – Letting and hiring of services—Mutuality—Contract of service.

A servant cannot be convicted of the offence of departing from service for refusing to resume service after undergoing imprisonment under the Masters and Servants Acts.

Where a servant has been engaged for a fixed period the fact that the master has the option to employ the servant in the manufacture of certain articles at a certain sum for every thousand articles or to employ him in other work at fixed wages per diem does not exclude the operation of the Acts.

If, however, the servant has purported to let his services for a certain period without a reciprocal hiring of such services by the master for the full period, the criminal liability of the servant attaches only as long as the civil liability of the Master to employ him continues.

This was an appeal from a decision of the Resident Magistrate of Stellenbosch, in the case of a private prosecution for contravention of the Masters and Servants Act 18 of 1873, section 4, sub-section 6. The appellants, who had just been released from prison for contravening the above Act, did not return to their master's service, and accordingly they were again brought up and charged with unlawfully departing from the service of their master. They were found guilty and a sentence of a fine of 5s. each, or three days' imprisonment imposed.

The contracts between the respective appellants and the respondent were put in at the trial and were in the following terms, the dates only varying: Agreement made the 7th day of June, 1897, between —— of the one part hereinafter called the employé, and Henry Rowe Rowe, brickmaker, Stellenbosch, of the other part, hereinafter called the employer.

The employé agrees to work for the employer in his brickfield or other place, in any capacity directed by him from the date hereof until the 7th day of June, 1898, at the prices mentioned in the schedule and under the conditions named herein, should the employer so require.

The hours of work to be as follows: During the months of May, June, July and August from 7 a.m. until 5.30 p.m., one hour being allowed for dinner; during April and September from 6 a.m. until 6 p.m.; March and October, from 6 a.m. to 6.30 p.m.; November, December, January, February, from 5.30 a.m. to 7 p.m., one hour being allowed for dinner and half an hour for breakfast. Should it however be necessary for the proper performance of the work, the employer may alter or vary any of the above stated hours of work. In consideration of which the employer shall pay to the employé weekly wages at the following rates, which shall include all necessary and proper incidental works:

	From May 24 to Aug. 31. per 1,000	From Sept. 1 to May 23. per 1,000
Moulding	3/-	2/6
Ball-making	1/9	1/6
Off-setting	1/3	1/-
Clay Wheeling ...	1/3	1/-
Clay Mixing	1/-	9d.
Clay Chopping ...	9d.	9d.
Barrow Loading ...	4d.	4d.
Sand Sifting	3d.	3d.
Ash Sifting	3d.	3d.
Kiln Stacking... ...	6d.	6d.
Wheeling Bricks to Kiln	9d.	9d.
Casing Kiln	2d.	2d.
Loading Carts or Trucks from Kiln	6d.	6d.
Carting Bricks ...	1/-	1/-

Any other work, 3s. per day.

Should the said employer fail to provide the employé with employment for a period exceeding one full working day, weather permitting, this contract shall be cancelled.

Mr. Schreiner, Q.C., for the appellants: This is not a contract subject to the Masters and Servants Acts inasmuch as such a contract requires a fixed and certain wage; this is a contract for piece-work. The contract in itself is bad since *merces certum* is by Roman-Dutch law essential to a contract of letting and hiring of services.

[De Villiers, C.J.: I infer from Act 15 of 1856, section 2, that a labourer who has to do a particular piece of work in a certain time comes under the Act.]

That is *merces certum*; this contract is not of that nature.

[De Villiers, C.J.: By the contract the employer has the option of making the men work at a certain price *per* day.]

That refers only to "other work" and cannot give colour to the whole of a contract which deals principally with piece-work. This point was raised in *Baker* v. *Dormer* (Juta 1, p. 253) but not decided. The amount of wages is left to the diligence of the employé; the *merces* is therefore *incertum*. The contract is not *locatio conductio operarum*. but an innominate contract. It is inconsistent with section 11 of Act 15 of 1856, which provides that if a servant is ill he shall be paid a month's wages.

Under the last clause the master may refuse to give appellants any work for a whole day. The appellants did not depart from their master's service since they had not returned to it after their first conviction.

Thirdly, the contract is between Rowe and the appellants, and by it they agree to serve him on his brickfield; the evidence shows that he had no brickfield and is the manager for the Stellenbosch Brickfield Company; but he cannot compel the appellants to serve that company

De Villiers, C.J.: The appellants were convicted of a contravention of section 4, sub-section 6, of Act No. 18 of 1873 in that they did, without lawful cause, depart from their master's service, with intent not to return thereto. Before the charge was laid they had been convicted of a similar offence and sentenced to be imprisoned for a certain period. On the expiration of that period none of them returned to service. There was, therefore, no departure from their master's service, whatever other statutory offence they may have been guilty of. In fact, the Masters and Servants Act of 1856, chapter 5, section 10, makes it an offence for a servant, after undergoing imprisonment under that Act, to refuse or neglect upon his master's request to resume his service under his contract. It may fairly be contended that this sub-section would have applied to the appellants seeing that the Act of 1856 (chapter 5, sub-section 6) also makes it an offence for a servant without lawful cause to depart from his master's service with intent not to return thereto. But whether or not the first conviction can be regarded as having taken place under the Act of 1856 as amended by the Act of 1873, I am of opinion that unlawful departure from service and refusal to resume service after imprisonment are two distinct offences, and that the commission of one of them would not justify a charge of having committed the other offence. Upon this ground the conviction ought to be quashed, but the appellants are anxious that the case should be decided, if possible, on its merits, and I proceed to consider whether it is a case falling under the Masters and Servants Acts at all. As regards the nature of the appellants' employment the definition of the term "servant," as given in the Act of 1856, is wide enough to embrace them. There was a written undertaking on their part, for the period of one year, to work for their employer in the manufacture of bricks. For certain kinds of work in the process of brickmaking, such as moulding and off-setting, they were to receive pay at the rate of so much per thousand bricks, but for "any other work" they were to reeeive a fixed sum a day. I cannot concur in the view that, even if the master were bound to employ the appellants for the period fixed they cannot be regarded as servants under the Acts. If there was a mutual agreement, amounting to a contract of service, the fact that the master could pay the men at a certain sum per thousand bricks for certain forms of work would not take them out of the category of servants. But the important question is whether there was such a mutual agreement at all. The men undertook to work for their master, but he did not undertake to provide them with work so long as the service continued. On the contrary he could at any time put an end to the contract by failing to provide them with work for a longer period than one day. Whatever the nature of the agreement might be it was not a "contract of service," which is the only kind of contract which would impose a criminal liability on the appellants. Just as there can be no lease of a house without a reciprocal obligation upon the lessee, so there can be no letting of services without a reciprocal obligation upon the alleged hirer or employer of such services. The want of mutuality does not raise merely the question of consideration but it goes to the root of the relation between master and servant. So long as slavery was legal no such mutuality was required as between master and slave, but since the abolition of slavery the only legal relation between master and servant has been that of hiring and letting of services. Where a servant has purported to let his services for a certain period without a reciprocal hiring of such services for the full period, the criminal liability of the servant under the Masters and Servants Acts of 1856 and 1873 attaches only so long as the Master's civil liability to employ the servant continues. In the present case there is really no civil liability whatever on Mr. Rowe, the respondent, for he is at liberty at any time to cease to provide work for two days and upon his so ceasing the contract is *ipso facto* cancelled. In the opinion of the Court, therefore, the appeal must be allowed and the conviction quashed.

Mr. Schreiner asked for the appellants' costs.

De Villiers, C.J.: It is very exceptional to have any application made for costs in these cases. In this case the least that could have been done was to give notice to the respondent as to the application for costs, because if such notice had been given he might have entered an appearance. Under the circumstances, therefore, the Court cannot allow costs, but the appeal will be allowed.

Buchanan and Maasdorp, J J., concurred.

[Appellants' Attorney, D. Tennant.]

POOLE V. BAWDEN'S ESTATE. { 1898. May 3rd.

Amendment of pleadings--Magistrate's discretion.

An exception having been taken and allowed in a Magistrate's Court to a summons by which G. was sued as executor testamentary of B's *estate, on the ground that he ought to have been sued in his capacity as secretary of a certain company whose secretary for the time being had been appointed as one of the executors, an application was made for an amendment of the summons. The Magistrate refused to allow the amendment on the grounds that a material allegation had been omitted, and that such an amendment would encourage laxity of practice. There was a second exception that the co-executor ought to have been joined as co-defendant.*

Held, *under the circumstances, that there was not sufficient ground for disturbing the judgment.*

This was an appeal from a judgment given by the Acting Resident Magistrate at Kimberley in a civil action brought by Poole against the estate of the late H. Bawden, for the recovery of £10 10s. for the baiting and training of a horse. The person summoned was F. J. Gardiner, in his capacity as executor of Bawden's estate. Two exceptions were taken to the summons, viz., first, that F. J. Gardiner was sued in his individual capacity as executor, whereas he should have been sued as secretary to the Board of Executors, which was one of the co-executors in the estate; and secondly, that C. W. Singleton should have been made co-defendant to the summons, he being co-executor. It was admitted that Singleton was in Pretoria. The Magistrate, without discussing the second exception, upheld the first, and dismissed the case. Plaintiff's agent in the Court below wished to amend the summons by adding to Gardiner's name the words "secretary to the Board of Executors," but the Magistrate refused to allow that to be done. It was upon this refusal to allow the summons to be amended that the appeal was now based.

The Acting Magistrate gave the following reasons for his judgment: I consider that the amendment is not such a one as the Court has the power to order under section 50 of Act 20 of 1856. It is further certainly material and would in my opinion prejudice the defence. Besides, too liberal an application of the powers confined upon magistrates by section 50 is not always advisable, laxity of practice being encouraged thereby.

Mr. Searle, Q.C., for the appellant: The first exception was of the most technical character. No amendment was necessary. Letters of administration were granted to "the Secretary of the Board of Executors" and Singleton. Gardiner's only *locus standi* to appear in court was a power in his own name. In any case the amendment should have been allowed. *Thompson* v. *Barkly East Rinderpest Committee* (7 Sheil, p. 414); *Meizenheimer* v. *Dieterle* (7 Sheil, p. 490).

De Villiers, C. J.: If we allow the amendment the Magistrate may have to try the case against one executor only.]

The second exception was really a plea in abatement and required evidence. The Magistrate should have called evidence if not satisfied that Singleton was out of the country. On a plea in abatement like this the defendant must show not only that the other executor is alive but that he has administered. *Williams on Executors* (Vol. II., p. 1831). The matter was discussed in *In re Schoeman* (J. 10, p. 1). In *Pienaar* v. *Rattray* (J. 12, p. 35) it was held that it was not necessary to join two partners as defendants where one was out of the country,

Mr. Innes, Q.C., for the respondent, was not called upon.

De Villiers, C.J.: The executors appointed by the deceased were the secretary for the time being of the Board of Executors and one Singleton. Mr. Gardiner in taking out letters of administration, did so in his capacity as secretary, but he is sued in the present case without any reference to that capacity. That is a very material omission, because it is obvious that the secretary of the Board was appointed with a view to the credit of the Board, and not to his individual credit. Gardiner was sued alone, and the first exception taken was that he should have been sued as secretary to the Board. The Court below allowed the exception—whereupon the plaintiff's agent asked for leave to amend the summons which was refused. The present appeal is therefore practically an appeal against such refusal. The Court below undoubtedly had the power to allow the amendment, but was it an unwise or improper exercise of its discretion to refuse the application? Under all the circumstances I consider it was not. In the case cited of *Thompson* v. *Barkly East Rinderpest Committee*, the objection was taken that the defendant, who served Government in two capacities, viz., as Civil Commissioner and as Resident Magistrate, ought to have been sued in the latter capacity instead of in the former. The Magistrate allowed the exception, but the Court on appeal allowed an amendment to be made, and remitted the case to the Magistrate to be tried on its merits. The case was ripe for hearing on its merits, and the exception was so obviously technical, and indeed trivial, that the Court had no difficulty in allowing the amendment. The objection in the present case was more substantial, and as the Magistrate refused the amendment on the ground that it would introduce laxity of practice, I am not inclined to interfere. The reason for his refusal becomes still clearer when we come to consider the second exception, which was to the effect that the co-executor Singleton ought to have been joined as co-defendant. It was not alleged that Singleton resided out of the Colony, although incidentally it was stated that he was not then in the Colony. By allowing the first exception the Court below gave the applicant an opportunity of reconsidering the question of joinder of Singleton before issuing a fresh summons. The appeal must be dismissed with costs.

[Appellant's Attorney, D. Tennant; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

MUFF V. GEDDES. { 1898. May 4th. „ 11th. „ 17th.

This was an action to recover the sum of £683 13s. 10d., the balance of the purchase price of certain property at Observatory-road.

The declaration stated that the plaintiff, on the 13th November, 1897, sold the property, through Ford & Co., brokers, to Messrs. McFadyen & Thom for £2,400, and that, after deducting £717 2s. 10d., the amount of a bond on the property, the purchasers paid the balance on the 20th December to the defendant, who at that time held the plaintiff's power of attorney. That the defendant paid out £33 9s., being surveyor's charges, brokerage, and the fee for cancellation of the bond. That the defendant neglected to pay over the balance of £683 13s. 10d., and claimed to deduct therefrom £62 1s. as commission on the £2,400 and for other charges.

The defendant in his plea alleged that after Ford & Co. had made an offer for the purchase of the property, he had by the plaintiff's special instructions conducted the negotiations for and concluded the sale on plaintiff's behalf. He denied that only £33 9s. had been paid out by him, or that £683 13s. 10d. was the balance due. He said that, acting as plaintiff's agent, he had paid out and disbursed certain necessary costs and charges amounting to £35 10s. 6d. The items were made up as follows: Paid Mr. Ayliff for releasing and attending to cancel bond, £1 11s. 6d.; do. for drawing certificate to lodge bonds, 7s. 6d.: do. for stamps, 9s.; do. for Divisional Council certificate of valuation, 2s. 6d.; paid Ford & Co. for brokerage, £30. He said he was by law and custom entitled, as the agent employed by plaintiff to conduct and conclude the sale and transfer, to charge £60, as 2½ per cent. commission on the purchase price. That after deducting the aforesaid amounts, there was due to plaintiff from him the sum of £621 12s. 4d., for which amount he had forwarded his cheque to plaintiff. That plaintiff had accepted the cheque, and there were funds in the bank to meet it.

The replication stated that plaintiff had returned the cheque, but was otherwise general.

Mr. Graham (with him Mr. Maskew) appeared for the plaintiff.

Mr. Buchanan (with him Mr. Close) for the defendant.

Mr. Buchanan applied for a postponement of the case on account of the defendant's illness. He had a certificate from Dr. Hewat certifying that Mr. Geddes was unable to leave his residence on account of a severe attack of enteritis, and that it was unlikely he would be able to attend his office for two days.

In reply to the Chief Justice,

Mr. Graham said he was entirely in the hands of the Court. Of course he could not press the case as the defendant was not able to appear, but he was ready with his witnesses, and prepared to go on with the case.

Mr. Buchanan said he was not in a position to cross-examine plaintiff's witnesses, not having seen the defendant.

The Chief Justice: Will defendant pay the costs of to-day?

Mr. Buchanan said he understood that in the ordinary course they would have to do so, but in the present instance the attorney for the defence had informed plaintiff's attorney about these facts the previous afternoon.

Mr. Graham pressing for costs for the day,

The Chief Justice said the Court would be in a better position to judge as to that after the trial. The case would be postponed until the 11th inst.

Postea (May 11th.)

Mr. Buchanan said the defendant was not yet well enough to appear before the Court. He had had a consultation with defendant, and thought it would be preferable to hear the whole case at the same time, but he would leave himself in the hands of the Court as to whether or not it was desirable to go on with the case and hear defendant's evidence subsequently.

The Court resolved that the witnesses present be heard.

Mr. Buchanan then applied for two amendments of the plea.

These were opposed by Mr. Graham, but subsequently allowed on the understanding that no final judgment would be given until the plaintiff had an opportunity of bringing evidence with regard to these amendments, if necessary.

Emily Muff, the plaintiff, stated that her husband, who was a carriage builder, died in October, 1897. Witness lived at Observatory-road, and at the time of her husband's death had some property in her own name. After her husband's death she asked Mr. Geddes to take charge of her husband's estate, giving him a general power of attorney. In November witness sold, through Mr. Ford, some property to Messrs. McFadyen & Thom, who were occupying a house and shop, part of the property. Witness had promised to give McFadyen & Thom the first offer if she was inclined to sell the property. She accordingly sent to them and offered them the property for £2,500. They asked her to wait a week. A few days afterwards they sent Mr. Ford to witness. He offered her £2,300 for the property which she refused, but ultimately sold it to McFadyen & Thom, through Mr. Ford, for £2,480. Previous to that she had had no communication with Mr. Ford. On November 11 she received a letter from Mr. Ford, and subsequently on November 13 a broker's note was passed for the sale of the property.

By the Court: There was an arrangement made between plaintiff and Mr. Ford for brokerage. (Broker's note put in).

Examination continued: Regarding the conditions in the broker's note as to witness leasing a part of the property, she made that arrangement with Mr. Ford. Up to then Mr. Geddes knew nothing of the transaction. When witness received the letter from Mr. Ford, she saw Mr. Geddes and said she wanted a deed of transfer drawn up. She did not remember if she told him any of the details of the sale, but she told him she had sold the property. He told her he could have got more money for it. She did not authorise Mr. Geddes to write any letters in the matter. He told her the property would have to be surveyed as there were two properties on the land. On December 20 she received a letter from defendant, enclosing a cheque for £621 12s. 4d. She first deposited the cheque in the bank, but afterwards, on instructions from her attorneys, cancelled the deposit and returned the cheque. (Correspondence between plaintiff and defendant was put in, in the course of which plaintiff repudiated defendant's claim for commission on the sale of the property, although expressing willingness to allow him a reasonable sum, not exceeding £2 2s., for his services in connection with the survey and transfer.) At nearly all the interviews witness had with Mr. Geddes, Withnall was present.

Cross-examined: Before her husband's death witness carried on business separately from her husband as E. James & Co. That stopped three or four years ago. After her husband's death she carried on his business. Mr. Brittain was her agent in her husband's time, but afterwards she transferred the agency to Mr. Geddes. Witness gave him a power of attorney on October 13, which was cancelled on Dec. 21. Witness had definitely concluded the sale of the property on November 11. Witness might have gone to defendant on November 12, but she did not tell him to take over the sale of the property as she did not like agents. She could not remember if she showed him Ford's letter of November 11. She was told that the seller generally paid brokerage, but in consideration of her taking £100 less she was only to pay £30 and transfer expenses. Geddes sent her to Mr. Ayliff about the survey, and the latter took his instructions from her. Witness had nothing more to do with the survey after that, but her manager often saw Geddes about it.

Re-examined: Witness arranged with Mr. Ford that he was to get half the commission from her. On November 12 he came to her, and she agreed to pay half the brokerage.

By the Court: The purchasers had paid the other half of the commission.

William Ford, a broker, carrying on business in Cape Town as Ford & Co., stated that Messrs. McFadyen & Thom asked him to conclude negotiations with Mrs. Muff as to the purchase of the property. On November 9 he saw plaintiff, and offered her £2,300. She referred him to her manager (Withnall) in Barrack-street, and after negotiations, the price was fixed at £2,400. On November 11 witness met plaintiff and her manager at Barrack-street, and it was arranged that plaintiff should pay half the commission. After the titles had been inspected at the Building Society's office, the broker's note was passed on November 13. On the morning of November 13 he received a letter (put in) from Mr. Geddes, but took no notice of it, as the sale had been concluded.

Cross-examined: The sale was really concluded, and the broker's charges arranged on November 11 at the meeting at Barrack-street. The lease was arranged next day, after the sale was concluded. Witness did not go and see Mr. Geddes, but met him casually in the street, and told him the sale was concluded. The letter of November 11 was simply to clinch the sale. After the passing of the broker's note witness looked to Geddes for the arrangements as to the survey.

By the Court: Witness had nothing to do with Geddes in the matter of the sale.

Henry Withnall, son-in-law of the plaintiff, and manager of her business, gave corroborative evidence as to the sale of the property being concluded on November 11. After the broker's note was passed he consulted Mr. Geddes about the survey and transfer.

James McFadyen, partner in the firm of McFadyen & Thom, deposed to having employed Mr. Ford to conclude the purchase of the property for the firm. Witness had no dealings in the transaction with Mr. Geddes until the broker's note was passed. He then went to Mrs. Muff, and she sent him to Mr. Geddes about the transfers.

Cross-examined: Witness paid the purchase amount some time after December 1 to Messrs. Reid & Nephew, leaving it to them, as his agents, to secure him.

This closed the case for the plaintiff,

For the defence,

Kenneth John McKenzie, teller at the African Banking Corporation, of which both the plaintiff and defendant were customers, said that he remembered Mrs. Muff's manager coming on her behalf on the morning of December 21, and depositing the cheque produced. The cheque was paid in to Mrs. Muff's credit, and witness passed it through his cash-book. About an hour afterwards Mrs. Muff wanted the cheque back, but witness said he could not give it to her. It was not usual to give cheques back. Afterwards, on the accountant's instructions, he returned the cheque, and altered his cash-book accordingly.

The further hearing of the case was postponed until the 17th inst., Mr. Justice Buchanan saying that if defendant was not likely to be able to appear then an application had better be made for a commission to take his evidence. It was also agreed that the money as tendered be paid in to Mrs. Muff's account, without prejudice to Mrs. Muff's claim for the £62 1s. 6d. additional.

Postea (May 17th).

Mr. Graham said that since the case was last before the Court it had assumed a rather different complexion. At the last hearing of the case an order was granted for the return of the cheque of £621 12s. 4d. to the plaintiff, the Court receiving an assurance from counsel for the defence that the money was still to the credit of defendant in the bank.

The Chief Justice: The bank clerk said it was.

Mr. Graham said that was so, and that immediately after plaintiff received the cheque back it was presented for payment to the bank, but was dishonoured. Plaintiff did not know what funds there were to defendant's credit at the bank, and an affidavit had been made by Mr. Moore, her attorney, and an application made for an order restraining the African Banking Corporation from parting with any moneys belonging to defendant in its possession. A rule was granted, returnable that day, and operating as an interdict. He now asked that the rule should be made absolute.

Mr. Buchanan said he had no objection, but he could only say that whatever the circumstances might be with regard to the money now, the correspondence showed that the plaintiff might have had it all if the cheque had been cashed at the time, and all the trouble been saved.

De Villiers, C.J.: Yes, but your client had no right to leave the Court under the impression that the money was still in the bank.

Mr. Graham urged that before defendant could make any further defence in the action he should deposit a sufficient amount in the African Banking Corporation to meet the cheque, because if defendant had not got funds to meet the cheque it seemed idle to pursue the action further and increase the costs.

De Villiers, C.J.: How much is there in the bank to defendant's credit?

Mr. Buchanan said he would obtain the information.

De Villiers, C.J.: There is no doubt defendant has been guilty of a breach of trust. The money should not have been deposited in his own name at all, but should have been deposited to a trust account.

Mr. Buchanan said he had been instructed that defendant could not appear to-day, but might be able to appear in a couple of days. If not, they would take his evidence on commission. He suggested that Mr. Currey be appointed commissioner.

Mr. Graham asked that the Court, before making any order, hear the evidence of Dr. Hewat. He had been instructed that Mr. Geddes had been seen going about town since the case was last before the Court.

Dr. D. B. Hewat stated that he had been attending Mr. Geddes for some time, and gave the certificate put into court on a previous occasion. Witness saw defendant that morning, and did not consider that he was in a fit state to attend court. He was suffering from the after effects of alcoholism.

By De Villiers, C.J.: Defendant had been about since witness gave the certificate, but that day he was again ill. He might be able to attend court in two days. The enteritis, for which witness previously gave the certificate, was actually due to alcoholism.

Mr. Buchanan said that he had now been instructed that there was £171 9s. 5d. to defendant's private account, into which, he had been instructed, defendant paid the plaintiff's money. There was a partnership account between defendant and Mr. Frost, and certain partnership assets, but there were also certain partnership creditors.

De Villiers, C.J., said they had better, at all events, secure that £171 9s. 5d. to the plaintiff.

Mr. Graham asked for judgment for the £621 12s. 4d.

De Villiers, C.J.: There has evidently been a breach of trust in appropriating this money. Under these circumstances the Court is justified in giving judgment by instalments. Therefore for the present the

Court will give judgment for plaintiff for the £621 12s. 4d., the amount tendered, and make an order that within four days from date the defendant pay into the bank a sufficient sum to meet that amount. The question of the defendant's claim to the £60 will be deferred until his evidence has been heard either in the Court or by examination before a commissioner, Mr. Currey being appointed commissioner. Execution will be issued against the £171 9s. 5d. in the hands of the bank.

The evidence of the witnesses for the defence who were present was then taken.

John Ayliff, an attorney of the Court, stated that he was engaged to do certain work in connection with the sale to Messrs. McFadyen & Thom of certain property belonging to Mrs. Muff. Witness never saw Mrs. Muff except on the matter of the survey. He had the property surveyed, and found there were three mortgages on it, the Building Society being the mortgagee. Witness received the cheque of £621 12s. 4d. from Messrs. Reid & Nephew, and delivered it to the Building Society, which would not give up the deeds until the money was paid. All witness's charges were for work necessary for the transfer of the property. Mrs. Muff gave witness the power of attorney with regard to the transfer.

Cross-examined: The money for the Building Society did not exactly pass through witness's hand, and never passed through his banking account in any way. He simply walked with the cheque across from Messrs. Reid & Nephew's, and deposited it with the Building Society. Witness believed the cheque for the balance was made out in his name. He passed it through his bank account and paid the money to Mr. Geddes, deducting the money due to himself (witness). Witness thought the charges he made were fair and reasonable, and not higher than the usual charges.

Thomas Herbert Hazell, a broker and commission agent, said he had heard the evidence in the case, with regard to the defendant taking steps for the transfer of the property under the general power of attorney given him by the plaintiff. The custom in general agencies was to charge 5 per cent. on all collections and 2½ per cent. on other business. The above transaction would come under the second head.

De Villiers, C.J.: But suppose a person sold a property through a broker for £1,000, would he have to give the broker 5 per cent. and the general agent 2½ per cent. as well?

Witness: That is the rule, but it is not always adhered to.

De Villiers, C.J.: I hope it is a rule respected more in the breach than in the observance.

Cross-examined: Witness would certainly not make that charge in such circumstances. It was the custom, but he would not follow the custom under the attendant circumstances. In his opinion it would be unreasonable to make such a charge under the circumstances. He would in such a case have made an arrangement beforehand as to his charges.

De Villiers, C.J., said with regard to the commission to take defendant's evidence, that he did not want it taken until the money was lodged. There was no use in putting the plaintiff to further expense.

Mr. Graham asked that the rule made absolute that morning be with costs.

This was granted.

The further hearing of the case was then postponed.

[Plaintiff's Attorneys, Messrs. W. E. Moore & Son; Defendant's Attorney, J. Ayliff.]

SUPREME COURT

[Before the Right Hon. Sir J. H. de Villiers, P.C., K.C.M.G., (Chief Justice), and the Hons. Mr. Justice Buchanan and Mr. Justice Maasdorp.]

PROVISIONAL ROLL.

SAVAGE AND SONS v. SCHREIBER.
1898. May 5th.

This was an application for judgment by default of plea for the sum of £1,922 15s. 5d., goods sold and delivered.

Mr. Searle, Q.C., appeared for the applicants.

Mr. Jones appeared for the defendant, and applied for leave to purge his default and file a plea.

An affidavit by defendant's attorney, Mr. C. W. Herold, was put in, in which the deponent alleged that he had been in communication with the defendant regarding the matter, but the accounts were of a complicated nature and most involved, and he would not be in a position to instruct counsel until he received further details from the defendant. The defendant had a good substantial defence, and would be greatly prejudiced if not allowed to purge default.

[De Villiers, C.J.: Why was this case not set down in the ordinary way for leave to purge default? According to the rules, you are not entitled to be heard at all now.]

Mr. Jones: The defendant's attorney has been taken by surprise in the matter. A tender of a certain amount was made to the plaintiff, and it was believed that that was under consideration; it was only after the case had been set down for trial and notice given to the attorney that he was made aware that the tender had not been accepted. Besides, he had great difficulty in communicating with the defendant, who apparently lived somewhere near Humansdorp.

The Chief Justice pointed out that the case had been set down since April 25.

Mr. Searle: I press for judgment. The action is for money due on an account, and the declaration states that the account has been running for many years. Prior to 1894 the defendant was indebted to the plaintiffs for goods sold and delivered, and an account rendered on June 30, 1894, showed the amount due to be £1,542 16s. 8d. Accounts were rendered from time to time, and on January 23, 1898, the plaintiff firm rendered an account made up to date for £1,922 15s. 5d., and everything has happened to justify their claiming that amount. The plaintiffs were the supporting firm, and defendant is a trader in the Long Kloof, in the district of Uniondale. The judgment will, according to the rule of Court, not be final, and there is every reason now for getting judgment; some arrangement may be come to afterwards. If the plaintiffs were to go to execution the defendant may apply for leave to defend, which can be granted on certain terms by the Court. Plaintiffs do not believe that there is any *bona-fide* defence to this action, and they are afraid of the defendant becoming insolvent. The action is of the most simple character possible, and no communication has been received as to what the defence is to be.

De Villiers, C.J.: Defendant has had ample time to plead to this action, and even now we are not informed what the defence is, there being no information supplied, except that the attorney lives at a distance from his client. The distance is not so very great, and I think the attorney should have indicated what his client's defence would be. Judgment will be final in one sense, but not in another. The Court will now give judgment for the plaintiff as prayed, reserving the right to set aside judgment on such terms as to costs and otherwise as the Court may deem expedient.

[Plaintiff's Attorney, C. C. Silberbauer; Defendant's Attorney, W. B. Herold.]

GENERAL MOTIONS.

PETITION OF THE MINOR CORNELIS BENEKE.

Mr. Close applied for leave to sell certain landed property belonging to the minor Cornelis Beneke. From the petition it appeared that the minor was entitled to one eighty-fourth share of a certain farm. The majors had sold their shares, and it was now considered, in the minor's interest, that his share being so small should be sold along with the others' shares. The Master reported favourably on the application, subject to certain conditions as to the purchase price.

Order granted in terms of the Master's report.

KAYE V. KAYE.

Mr. Buchanan applied for leave to the applicant to sue by edictal citation in an action to be instituted by him against his wife, Lottie E. Kaye (born Woodward), for divorce, by reason of her adultery. Two letters had been received by petitioner from his wife since she went to the Transvaal, one of which, received last December, bore the address, P.O. Box 2,318. It was therefore thought there would be no difficulty in effecting personal service.

Counsel asked that the edictal citation might be made returnable on May 20, personal service to be effected, and also that leave be granted to serve the intendit with the citation, and notice of trial.

Order granted as prayed.

BIRD V. BIRD.

This was an application for the extension of the return day of an edictal citation.

Mr. Close said that leave was granted by the Court on February 10 to sue by edictal citation in this action, which was one for divorce. At that time it was believed that personal service could easily be effected, but since then defendant had managed to elude the applicant. Under the special circumstances counsel asked for a short return day, say, about June 9 next, so as to allow of the order being sent Home by cable and also for substituted service. The applicant was in poor circumstances and anxious to get to England as soon as possible, where her relatives could support her. The order could be published in the "Daily Telegraph" or in the local paper at Cowes, in the Isle of Wight, where the defendant was last heard of, and where his mother and sister lived. The mother and sister had refused to give any information as to defendant's whereabouts.

The Court granted the order as prayed, the return day being extended to June 9. with leave to set the case down for trial on June 13, and to serve notice of trial along with the service of citation. Service to be effected with the mother or sister as prayed, one publication to be made in the "Hampshire Herald." This order to be cabled to England.

THE UNION BANK, IN LIQUIDATION. { 1898. May 5th.

Mr. Schreiner, Q.C., moved for the confirmation of the ninth and final report of the liquidators (Messrs. G. W. Steytler and Henry Gibson) of the Union Bank, and the final accounts annexed thereto.

The report was as follows:

The official liquidators beg to submit to this Honourable Court their ninth and final report on the liquidation. Since the date of the order granted on our eighth report authorising the sale of the remaining assets of the bank by public auction, circumstances were brought to our knowledge which rendered it advisable to continue negotiations with several persons, which negotiations resulted, after two applications to your Honourable Court for sanction in respect of compromises, in upwards of £3,500 being recovered. In one case considerable delay was caused by legal proceedings having to be instituted in Holland and several appeals prosecuted. These difficulties having been removed, the remaining assets were duly advertised and sold on December 9 last, realising £2,818, to which must be added life policies withdrawn from the sale and surrendered to the respective companies—in Cape Town £264 16s., in London £1,904 7s. 9d., totalling as per liquidators' accounts £4,987 3s. 9d.

The list of contributories who have paid their calls in full as confirmed by your Honourable Court represented a total of 1,313 shares, and, acting on authority already granted, the liquidators stated in their seventh report they had added to that list 273 shares. They have since added thereto the names of the following who have discharged their obligations, viz.: Estate late Thos. Hall, 6 shares; estate late P. J. Malan, 14 shares; estate late widow J. J. Hofmeyr, 8 shares; making a total of 1,614 shares; on which refunds have, in terms of the order granted by your Honourable Court, been paid from time to time, amounting in all at this date to £64 per share. To this must be added a further refund of £1 16s. 9d. as mentioned below, making a total refund of £65 16s. 9d. to all contributories who have paid the calls of £185 per share in full.

The liquidators have prepared an account in the usual form showing their transactions since 31st July, 1896, the date covered by their last account, and to assist your Honourable Court, as well as furnishing a comprehensive record of the liquidation, they have prepared a statement showing their total receipts and expenditure, which is also annexed hereto.

Receipts and Expenditure.

These accounts, after including the distribution proposed below, may be summarised as follows, shillings and pence being omitted.

Receipts.

Cash in hand and with other banks	£54,705
Assets collected	442,384
Calls (including interest thereon)	446,697
Damages recovered from C. T. Vos (a director of the bank) ...	5,397
Earnings in liquidation	10,932
Amounts received in trust	12,599
Unclaimed balances (written off)	540
Amounts received by set-off ...	72,501
Total	£1,045,757

Payments.

Secured creditors	£201,773
Unsecured creditors...	631,676
Calls refunded...	106,261
Payments to preserve securities (including interest on trust account)	2,071
Gratuity to former messenger of bank	100
Amounts received in trust paid out	12,599
Costs of liquidation—	
General charges (including salaries, stationery, advertising, postage, &c.)	2,159
Legal charges	2,411
Liquidators' remuneration ...	14,203
Cash transactions	973,255
Set-off as per contra	72,501
Total	£1,045,757

From this summary your Honourable Court will see that the total which passed through the liquidators' hands in cash was £973,255 18s. 5d. Of which appears on both sides for amounts received in trust, &c., and credited to other accounts and outside creditors, £12.599 8s. 2d.; leaving the net amount for this bank at £960,656 10s. 3d., which may be divided into the following proportions: £833,449 8s. 2d. paid to creditors, 86·8 per cent.; £106,261 14s. 6d. refunded to shareholders, 11·1 per cent.; £2.071 2s. 3d. paid to preserve the bank's interest in certain securities, 0·2 per cent.: £18,874 5s. 4d.. cost of liquidation (in which has been included gratuity to former messenger of bank to save the number of headings), 1·9 per cent.

The two former items total 97·9 per cent., whilst against the latter the liquidators might fairly claim to place the sum of £10,932 1s. 3d. received by way of interest, commission, and rents during the liquidation. Had this been done the net costs of liquidation would have worked out at 0·82 per cent.

This result has only been accomplished by the exercise of strict economies, among which may be specially mentioned the fact that from an early period in the winding up the services of the staff of the bank were dispensed with and the work done in the liquidators' own offices.

It will be noticed in the accounts from 31st July, 1896, herewith that the amounts received in trust are £12,599 8s. 2d.. of which has been paid out £12.362 12s. 4d. The difference of £236 15s. 10d. is accounted for by the following sums now standing to the credit of: J. H. Dekker & Co., formerly of Vryburg, firm now dissolved, and partners could not be traced, £229 0s. 1d.: Mrs. N. Armstrong, £4 8s.; H. Cloete, £3 7s. 9d.; total, £236 15s. 10d.

Every effort has been made to trace the parties concerned, but without success, and the liquidators request authority to pay these amounts to the Master of your Honourable Court, at the expiration of three months from the date of confirmation of this report if they be then still unclaimed, a course they would also ask your Honourable Court to sanction as regards any distribution authorised on this report, and which shall remain unclaimed at the expiration of the same period.

The balance shown in the accounts now filed, it is proposed to dispose of as follows: Unclaimed amounts to be paid in to the Master as above, £236 15s. 10d.; to liquidators to cover estimated cost of presenting this account, disposing of records, and closing off the affairs of the bank, £90 16s. 3d.; to contributories who have paid their calls in full, a thirty-sixth and final refund of £1 16s. 9d. per share on 1,614 shares, £2,965 14s. 6d.; less to be deducted on thirty shares held by late C. T. Vos, £27 11s. 3d.; total, £3,265 15s. 4d.

Destruction of Records.

On July 5, 1892, your Honourable Court authorised the destruction of certain records of the bank. These records were duly burnt, and the liquidators now ask for authority to destroy all books and documents remaining in their custody, subject to their being permitted to retain the cash books and ledgers used by them during the liquidation until six months from the date when the assets of the bank were finally disposed of, *i.e.*, until June 9, 1898, a verbal promise having been given to purchasers that these books would be retained until then.

Your liquidators beg respectfully to ask for an order from your Honourable Court: (*a*) To confirm this report and the final accounts annexed thereto; (*b*) that the cash balance be disposed of as suggested in this report: (*c*) that the books and records of the bank be dealt with as recommended above; (*d*) that in terms of section 30 of Act 12 of 1868 the Union Bank of Cape Town be dissolved.

Dated at Cape Town, this 28th day of March, 1898.

G. W. Steytler, Secretary,
Colonial Orphan Chamber and Trust Co.,
Hy. Gibson, Secretary,
South African Association.
Official Liquidators.

Mr. Schreiner remarked on the satisfactory nature of the report, pointing out the low cost of the liquidation, which amounted only to 1·9 per cent. of the amount which passed through the liquidators' hands, or deducting the amount received by way of interest, commission, and rents during the liquidation, 0·82 per cent.

De Villiers, C.J., said: The Court will make an order in terms of the report. I cannot allow this liquidation to close without expressing the fullest approbation of the Court of the manner in which the liquidation has been conducted throughout. The cost of liquidation has been phenomenally small, and this is due to the manner in which both the liquidators have performed their duties.

Buchanan, J., concurred.

ESTATE OF THE LATE FRANS PETRUS MOCKE.

Mr. De Waal applied for leave to the executrix to raise a further sum of money on mortgage on the property in this estate, the order for the raising of £120 granted by the Court having been found to be insufficient owing to some alteration to the building being required, involving the removal of certain walls, and which was not provided for in the first estimates.

Order granted.

SHORTLE V. COLONIAL GOVERNMENT.

Mr. Sheil, for the defendants, applied for a postponement of the trial of this action, which had been set down for hearing on May 9. The postponement was necessary on account of the unfit condition of a material witness for the defence. A doctor's certificate to that effect was handed in. Counsel said it would be impossible for the witness to attend before the 31st instant at least. He also asked for the costs of that application, on the ground that plaintiff's attorneys had been informed of the circumstances, but had refused to consent to a postponement.

Mr. Jones, for the plaintiff, opposed the postponement, and put in an affidavit by the plaintiff, in which he stated that he was a commercial traveller, and in connection with some business he had in hand would have to go up-country by the end of the month. He believed that his case would be prejudiced by such postponement.

De Villiers, C.J., said the case could come on on May 9, as proposed, and if the Court was then of opinion that it was necessary to hear the witness mentioned it could postpone the case. Costs of this application to be costs in the cause.

DOLF V. DOLF.

1898.
May 5th.

This was an action for divorce brought by Isabella Margaret Dolf (born Sole) against her husband, William Charles Henry Dolf, on the ground of his adultery with one Rosie Peterson.

Mr. Close appeared for the plaintiff; defendant in default.

R. D. H. Barry, clerk in charge of the marriage register in the Colonial Office, produced the certificate of the marriage of the plaintiff to defendant at St. Francis Church, Simon's Town, on February 9, 1888.

The plaintiff gave evidence to the effect that after marriage the defendant turned out to be a very bad and drunken character. There were no children of the marriage living. In 1891 defendant left witness, and she afterwards traced him to Claremont and Wynberg, where he was living with another woman.

Rosie Peterson, a laundress, stated that she knew defendant at Claremont, where he became engaged to her, and afterwards asked her to marry him: but they could not get married at once as they had to get some things together. They lived together as man and wife. She did not know until afterwards that Dolf was a married man.

The Court granted a decree of divorce as prayed.

[Plaintiff's Attorneys, Messrs. Scanlen & Syfret.]

SUPREME COURT

[Before the Right Hon. SIR J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

SHORTLE V. COLONIAL GOVERNMENT.

1898.
May 9th.

Railway Department—Non-delivery of goods Negligence—Fraud.

S sued the Colonial Government for the delivery of a case of dropery, or its value £110 17s. 6d, handed to the Railway Department for conveyance to Laingsburg on the 18th June, 1897.

The Department admitted the receipt of the case but denied its contents and value, and specially pleaded fraud on the part of the plaintiff in that after he had handed over the case to the Department he removed it from the Cape Town goods yard, and so rendered the performance of the contract impossible.

There was no direct evidence that the plaintiff had removed the case from the goods yard, but there was clear evidence that he had *attempted to induce certain persons to swear that they had seen him buy the goods on the Cape Town Parade, and that he had tried to induce a draper's assistant to give him a receipt for some of the goods.*

Held, *that the plea of fraud had been sufficiently established.*

This was an action in which the plaintiff, a trader, claimed from the Government delivery of a case containing wearing apparel and drapery or its value, £110 17s. 6d.

The declaration alleged that the case in question, weighing 310 lb., had been delivered by the plaintiff to the Railway Department at Cape Town on the 19th June, 1897, for consignment to himself at Laingsburg, and that the department had failed to deliver it. He annexed a document specifying the articles contained in the case.

The plea admitted the receipt of the case on the 18th or 19th, but denied that it contained the articles specified, and denied their value. It further alleged that the plaintiff had wrongfully and fraudulently removed the case from the Cape Town Station after its receipt by the Railway Department, and so rendered it impossible for the defendants to convey it to Laingsburg. They consequently repudiated the claim.

Mr. Jones appeared for the plaintiff.

Mr. Sheil (with whom was Mr. Bisset) for the defendants.

Michael Shortle, the plaintiff, said he was a trader and lived in Woodstock. He went on trading trips all over the Colony. The goods which he claimed from the Railway Department now were goods he had bought for his trading trips. He had bought them at different times between the months of February and June last year. Some were bought from merchants in Cape Town and for these he held receipts and accounts. Others were bought on Wednesdays and Saturdays on the Parade. He kept the goods at his house. The case of goods on which his claim against Government was founded was delivered to the Railway Department on June 19. Packing was finished at noon on that day. Witness could neither read nor write. He could write his name, but very badly. When witness packed the goods, his brother-in-law (Sharp), who lived in the same house, wrote down a list of them. The list produced was in Sharp's handwriting.

At the time the list was made there were present Johannes Lewis, John Vree, Mrs. Shortle, Peter Traut, and witness. Witness belonged to Kilkenny, Ireland. He had specified accounts to the amount of about £80, according to his reckoning-up, to show the value of the goods. Witness could not produce accounts for the full amount. The fair value of the goods was what they cost him, £110 17s. 6d. Some of the goods were not paid for yet. He had got to pay for them later. The goods for which he had no account were bought on the Parade, and no receipts were given at these sales if cash were paid. Auctioneers were prepared to give evidence that he had bought on the Parade for the last five years. The case was packed to the top, and nailed down; it was about 4 feet deep, 4 feet 6 inches in length, and 4 feet in depth. It took three men to lift the case on the wagon. The case was delivered to Checker Watkinson, of the Cape Government Railways. Watkinson weighed the case, found it to weigh 310 lb., and gave witness the receipt (produced). The address was on a piece of cardboard nailed on the box, and was addressed to Shortle, Laingsburg. Witness left on June 20 for Laingsburg, arriving there the following day, and stopped there until June 29. The case was never received at Laingsburg, and though he had applied to the Railway Department, he had been unable to recover it.

Correspondence between plaintiff's agents and the Railway Department was put in, which showed that the Department refused to compensate plaintiff without documentary evidence of the persons from whom he had bought the goods. Plaintiff's agents said this was impossible, as he had bought the goods on the Parade at various times and got no receipts.

Cross-examined: Sharp often bought goods on the sale for witness when he was absent. Witness believed he was in Cape Town during the months of April and May last year. Witness produced the receipts in November. He did not make any mention of them in the correspondence with the Railway Department, because he did not want to give that information as he had not specified accounts for all the goods. Witness did not claim £186 in the first instance. That was the selling price of the goods. He put into the box all the articles enumerated in the list. A man named Bester was repairing boots at witness's house when the box was being packed, but he did not go with witness on the wagon to the station, although he might have walked down. Witness did not know a man Carter by name. Witness had not taken drink with railway men since he came out of gaol, nor did he speak about his railway transactions with these men. He did not show them a cutting from the "Cape Times" with the report of the Judge's remarks in quashing his sentence. He had shown several people the cutting. He had been cautioned to have nothing to do with railway people. (Carter and Thomas were called into court, and witness said he knew them.) He was with Carter and Thomas in the Masonic bar, and got Carter to read the newspaper cutting for him, as he could not read. Witness did not say that if Budd had kept his mouth closed he would not have been convicted. Witness did not ask Carter to do him a favour, and say that he was present on the Parade when he (witness) bought goods. The claims clerk (Munday) had offered Sharp £150 to go against witness. Witness did not admit to Carter that he took these goods off the truck. If Carter said that it was a deliberate falsehood. He did not ask Carter if he would not give evidence himself to get him a man who would do so, nor did he on another occasion say that his lawyer had told him he need not produce a man who saw him buy the goods, but a man who saw them packed. He did not offer Carter £10 to find such a man. Witness remembered seeing Carter and Schafer on the Cape Town Railway-station platform. He never said to them that he was too fly for the Government. Witness did not know a man named Le Sueur. He only knew his master. He remembered meeting Le Sueur in the Masonic Hotel bar, but did not ask him for a favour and request him to make out an account in his master's name for thirty or forty overcoats at £1 each. If Le Sueur said so he was telling a lie Witness did not tell Carter last Thursday that for every witness the Government could produce he could produce half a dozen. Witness did not publicly boast that he had frequently defrauded the Railway Department. He never travelled without a railway ticket, and never was caught. He was a trader and commercial traveller, and when he got orders for Lea of the Blue House in the house-furnishing line he took the orders and delivered them.

By the Chief Justice: Witness had been convicted four times previously. He did not plead guilty. He did not know where Croefitt, who had given him the receipt for £30, lived. He bought the goods for cash, and that was all he wanted to know.

Cross-examination continued: With regard to the shirts he was accused of stealing, he was going to bring an action to prove that he had paid for them.

Re-examined: With regard to the receipt for the shirts put in at the criminal trial, witness was in gaol at the time, and on his wife visiting him he told her to go and look behind the clock, and she would find the receipts.

By consent, the record in the case of *Regina* v. *Shortle*, heard in October, 1897, was put in.

Archibald John Sharp, a brother-in-law of the plaintiff, corroborated his evidence as to the packing of the case and the list being made by him. Witness had bought goods for Shortle several times during his absence in the country. He got no receipts for those things.

By the Court: Munday approached witness with regard to giving evidence in another case, not in the present one.

Cross-examined: Witness had been in the Railway Department and knew Budd and Stokes. He never saw Stokes at the house. Witness never went to Munday and said that he had fallen out with Shortle, and if he got £150 he would give information by which these goods would be recovered.

Daniel Vry, residing at Laingsburg, deposed that in June last, shortly before the Jubilee, he was staying at Shortle's house, and saw the case packed and the list made out.

Cross-examined: All the goods were packed in on Saturday morning.

By the Court: No things were put in the previous evening so far as he saw.

Johannes Lewis, a servant in Shortle's employment, gave corroborative evidence.

Cross-examined: Half the goods were put in on the Friday evening and half on the Saturday morning. Witness's master had never spoken to him about the case.

Peter Traut, a blacksmith, residing at Somerset West, gave corroborative evidence as to the packing of the box, the making out of the list, and the removal of the box to the station. He came away from the station with the plaintiff.

Cross-examined: The case was partially packed when witness first saw it.

Christina Shortle, plaintiff's wife, gave corroborative evidence.

Thomas Watkinson said that in June last he was a checker at the railway-station, and on June 19, between one and two p.m., received a case from Shortle for which he gave the receipt produced. Witness saw the box taken towards the truck, but did not see it placed on the truck, although he made out the loading-up note. The number of the truck was 3,018; the number being on the note showed that the case had been placed on that truck. That note was placed on the truck and went with it. The truck must have left about 6.30 p.m. that day for Touw's River. When witness left the platform at 2.15 that day he believed it was clear. Witness did not know of any other goods being removed at Touw's River about that time.

Cross-examined: Between twelve and two witness was busy. It was possible for two or three men acting in collusion to have removed that case without witness seeing them. The constables would be there after witness left. Witness left with Stokes.

Re-examined: There were about forty or fifty men on duty about the yard. The box might have been removed without anyone taking notice of it.

William Henry Stokes said that in June last he was senior checker at the Goods' Station, and saw the case in question removed towards the truck. Witness saw Shortle there, and saw him leave. It would have been impossible to remove the case without several people seeing it done. Budd was on night-duty that night, and went on at six o'clock.

Cross-examined: Witness did not know Shortle well, and had never been in his house with him until twelve and one in the morning.

This closed the case for the plaintiff.

For the defence,

John J. T. B. le Sueur said that until recently he was a salesman in the employ of Mr. Spracklen, of the Co-operative Store in Plein-street. He went from there to the Economic and remained there until the expiration of the lease. He met Shortle in the Masonic bar. The latter called witness aside and asked him to give him a receipt for thirty or forty overcoats, saying that he had a claim for £110 7s. 6d. against the Railway Department. He offered witness £5 to make out the receipt in Spracklen's name. Witness refused to do anything of the kind.

Cross-examined: Witness had been in several situations, but left them of his own accord. He was certain he never sold Shortle any overcoats. He told Mr. Munday that he had evidence to give in this case. Witness was not to receive a cent for giving evidence.

Henry Edward Carter, a railway contractor, said that on February 2 last he and a ticket collector named Thomas were with Shortle, and went to have a drink in the canteen of the Theatre Bar. Shortle showed witness the cutting from the "Times" regarding his case, and complained about the hard way the Railway Department had treated him. He mentioned the missing box, and said that he was suing the Railway Department for it, and would make them sit up. Witness suggested that they had the goods, and Shortle said, "Of course we have the goods, but the railway authorities will have to prove it."

By the Court: Witness said to Shortle, "I suppose you know who has the goods," and Shortle replied, "Of course we know who has the goods, but it is for the Railway Department to prove it."

Examination continued: Afterwards, when they were outside and Thomas had gone away, Shortle wanted witness to say he had seen him (Shortle) buying goods on the Parade. He said he would give witness £10 to do so, and £20 if he won the case. Witness said he was in Pretoria at the time, and was too well known to the railway men. Shortle then said witness might get a man to give evidence to that effect. Witness said he would see about it.

By the Court: Witness went and reported the matter to Mr. Difford right away. On February 6, witness again saw Shortle, and the latter asked him if he had got a man yet. He said "No," and Shortle then said that his lawyer had told him he did not want the man who saw the goods bought, but one who saw the goods packed. Some time after he saw Shortle on the railway platform, and Shortle made the same remark as he did before, saying "Of course we have the goods." That was said in the presence of Schafer.

Cross-examined: The meeting in the bar was at 10.30 a.m. on November 2. He did not intend to give the evidence asked for if he had not been well known to the railway people. It was a curious statement for Shortle to make, but he did funny things sometimes.

Benjamin Thomas, ticket collector, in the employ of the Cape Government Railways, stated that he had known Shortle for eighteen months. Shortle was a man familiar with railway employés, and one who spent his money pretty freely when he had it. Witness corroborated Carter's evidence as to the conversation on February 2. Shortle said that if Budd had kept his mouth shut he would have been a free man that day. Shortle also said he was too fly for the Government. Witness did not hear everything that passed. He left Carter and Shortle speaking.

Christian G. Schafer, also a ticket collector at Cape Town Railway-station, said he had known the plaintiff for four and a half years. He corroborated Carter's evidence as to the conversation on the railway-station platform.

Thomas Alfred Munday, claims clerk for the Western system of the Cape Government Railways, deposed as to the complaint by Shortle of the loss of a box, and to the endeavours that were made to trace the box. Witness could not get straightforward replies from Shortle as to where he got the goods from, but ultimately he said he bought them from different auctioneers, mentioning the name of Mr. Behr. He also said he had bought portion of the goods from different merchants.

By the Court: Witness did not offer anyone a bribe to give evidence in that case.

Cross-examined: Witness explained in detail the working of tranship trucks. Witness had had no complaint with regard to a case of confectionery on the same truck as Shortle's case was put on. He believed some confectionery went astray, but turned up the following day.

This closed the case for the defence.

Mr. Jones was heard in argument.

Mr. Sheil was not called upon.

De Villiers, C.J.: On behalf of the plaintiff only one fact has been clearly proved, and that is that a certain case of considerable dimensions, weighing 310 lb., was delivered to the Railway Department. That is the only fact clear. What the contents of that case were has not been proved to my satisfaction. Several witnesses have been called to state what was in it, but it was the plain duty of the plaintiff when the Railway Department inquired of him what was in that case, and required of him proofs and vouchers as to the contents, to furnish the Railway Department with the full information at that time desired. The antecedents of the plaintiff were not such that the Railway Department could possibly trust him The man admits that he has been four times convicted, and on some of these occasions the convictions were for frauds on this very Railway Department. Under these circumstances, the Railway Department was perfectly justified in demanding from this man the fullest information and clearest proof before they paid him the money. His answer to the inquiries was that he bought all these goods from auctioneers on the Parade. Even if he did, surely these auctioneers would be able to furnish him with some proof as to his purchasing these goods, but none of those auctioneers were called, nor was any voucher of any auctioneers produced to the Railway Department. To-day the plaintiff puts in certain accounts, but I do not attach any weight to those accounts, considering the statements of witnesses with regard to the attempt to get cooked accounts. Upon the evidence in regard to the contents of the case, the Court would be quite justified in saying that, at all events, plaintiff would be entitled to only nominal damages, if entitled to damages at all, because he has not proved the value of these contents. I come now to the second point raised by the defence. This is the question as to whether the case, although it did come into the possession of the Railway Department, did not by some manner, by hook or by crook, come into the possession of the plaintiff again. There were witnesses for the defence who proved that on different occasions the plaintiff had said the goods did come into his possession again, but that it was for the Government to prove it. Mr. Jones has tried to put a different complexion on the statement, and to show that he meant the goods had been in his possession at the time of the delivery, which was a fact the Government denied, but clearly read by the context of the statement made by the plaintiff that could not be the meaning. Not only did he say that the goods were right enough in their possession, but that the Government must prove it. In a matter of this kind it is impossible for the Court to lose sight of the man's previous career. If a plaintiff comes into the Court with such antecedents as the present plaintiff, we cannot require the same strictness of evidence as against the defendant as the Court would require in the case of a person who came into the Court with clean hands. I think the evidence tendered on behalf of the Government is quite sufficient to justify this Court in saying that although the goods came into the possession of the Railway Department the plaintiff had probably through some friends amongst the railway officials at the time got re-possession of the case. That the plaintiff has intimate friends among some of those railway officials is perfectly clear. He seems to know the men Stokes and Budd, and Budd pleaded guilty to thefts from the Railway Department. These were friends of the plaintiff in the Railway Department who could so easily have helped him to obtain re-possession of the goods. In my opinion the plea has been proved, and the judgment of the Court must be for the defendants with costs.

Buchanan and Maasdorp, J.J., concurred.

[Plaintiff's Attorney, C. W. Herold: Defendants' Attorneys, Messrs. J. & H. Reid & Nephew.]

SUPREME COURT

[Before the Right Hon. Sir J. H. de Villiers, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice Buchanan and the Hon. Mr. Justice Maasdorp.]

REGINA V. VAN ROOI.

1898. May 12th.

Conspiracy—Act 23 of 1888, section 29.

A prisoner who tells his fellow-prisoners that he intends to escape, and asks them to escape with him, is not, in the absence of consent on their part, guilty of a contravention of Act 23 *of* 1888, *section* 29.

The Chief Justice said: The case has come before me of one Johannes van Rooi, a prisoner undergoing a sentence of hard labour in the Prieska Gaol, who was charged with contravening Act 23 of 1888, section 29, in that upon or about the 23rd April, 1898, and at or near Prieska, he did wrongfully and unlawfully conspire with another prisoner, one Petrus Kriel, to make his escape from outside the precincts of the gaol. The evidence against the prisoner was to the effect that he had told two fellow-prisoners that he intended to escape at the first opportunity, and asked them to go with him, but they refused. The prisoner was found guilty and sentenced to six months' imprisonment with hard labour, to take effect on the expiration of his present sentence. There is no proof there of conspiracy, because there must have been consent on the part of the others before there could have been a conspiracy. There is some evidence of an attempt to incite his fellow-prisoners to escape, but apparently that is not an offence in the case of a gaol, although it is in regard to convict-stations. Under the circumstances I have no option but to quash the sentence.

ADMISSION.

Mr. Close applied for the admission of Mr. John Lawson Cameron as a notary of the Supreme Court.

Order granted, the oath to be taken before the British Agent at Pretoria.

PROVISIONAL ROLL.

BUILDING SOCIETY V. W. J. HANCOCK.

Mr. Maskew moved for the final adjudication of the defendant's estate as insolvent, a provisional order having been granted by the Chief Justice on May 4.

Order granted.

VAN DER BYL AND ANOTHER V. MAURICE KLEIN.

Mr. McGregor moved for the final adjudication of defendant's estate as insolvent, a provisional order having been granted by Mr. Justice Maasdorp.

Order granted.

LEWIN AND ANOTHER V. H. J. DU PLESSIS AND ANOTHER.

Mr. Close applied for provisional sentence for £213, due on a promissory note.

Provisional sentence was granted.

DARLING AND DERBY V. C. M. DANTU.

Mr. Close applied for provisional sentence for £54, with interest at the rate of 6 per cent., due under the conditions of sale of certain land at Rondebosch.

Provisional sentence was granted,

ILLIQUID ROLL.

WARMSLEY V. A. G. JAMES. } 1898. May 12th.

Practice—Rule of Court 329D—Service—Return.

Judgment granted under Rule 329D upon a summons which claimed the sum of £12 as the value of a ring belonging to the plaintiff lost or mislaid by the defendant.

Mr. Buchanan applied, under rule 329D, for judgment for a sum of £48 10s., board and lodging from July 9, 1897, to January 12, 1898, and cash lent during the same period, and £12, the value of a ring belonging to plaintiff, lost or mislaid by defendant.

In the Sheriff's return it was not stated that the service had been made at defendant's residence or at his last known address, but that the summons had been served on Annie Warmsley at the plaintiff's residence at Sea Point.

Mr. Buchanan said that was where defendant had been boarding.

The Deputy-Sheriff reported that the place of service was the place where defendant had recently been boarding but that as the plaintiff's wife had told him that she had seen the defendant elsewhere in Cape Town, he did not know whether he could make the necessary return. The Court intimated, however, that he would be justified in doing so.

Postea (May 13th).

Provisional sentence was granted, subject to the Sheriff's return being amended so as to show that service was made at defendant's last known place of residence, and on the understanding that execution be not proceeded with until the Court considered the question of the claim for £12 damages for the loss of the ring, the case to be again mentioned by the Court.

De Villiers, C.J., said: This was an application for judgment under Rule 329, and the question arose as to whether judgment ought to be given for the second count, being the claim for the payment of £12, the value of a ring lost or mislaid by the defendant. We have considered the point since the application was made, and we think that as the defendant does not appear the demand is of a sufficiently liquidated nature to justify the Court in giving judgment.

ROBERTSON AND CO. V. HESSE.

Mr. Buchanan applied under rule 329D for judgment for £88 3s. 1d., due to plaintiff by defendant for goods sold and delivered, with interest *a tempore morae*.

Order granted.

REHABILITATION.

Ex parte D. E. LOUW.

Mr. Currey applied for the rehabilitation of Daniel E. Louw. The application was before the Court in November last, when permission was given to apply again in six months.

Order granted.

GENERAL MOTIONS.

MACELLI V. MACELLI.

Mr. Gardiner asked for a rule *nisi* in this case, calling on the defendant to show cause why the plaintiff should not sue him *in forma pauperis* for divorce. The defendant resided in Cape Town, and no difficulty was anticipated in effecting personal service.

Granted. Returnable May 20.

LAWRENCE V. LAWRENCE.

Mr. Gardiner made a similar application in this case. Defendant was at present a convict serving his term at Kimberley.

Granted. Returnable May 20.

RALPH V. COLONIAL GOVERNMENT.

Mr. Sheil applied, on behalf of the Government, for leave to sign judgment against the plaintiff for not proceeding with his action.

Granted.

DEKKER V. UNION BANK, IN LIQUIDATION.

This was an application on notice to the liquidators of the Union Bank, calling on them to show cause why the sum of £229 0s. 1d. should not be paid by them to the applicant.

The applicant alleged in his petition that in 1885 he entered into partnership with one Thomas Henry Brazier, and that they carried on business at Vryburg as John H. Dekker & Co., general dealers, and that they were supported by Messrs. Myburgh & Co., of Cape Town, now insolvent; that on the 30th June, 1887, the said partnership passed a covering bond for £2,500 to Myburgh & Co., by which certain landed property belonging to them was mortgaged; that the petitioner had himself mortgaged some of his private property to Myburgh & Co. as collateral security for the firm's obligations, and that the said bond was ceded to the liquidators of the bank by Myburgh & Co. on the 18th September, 1891; that in 1894 the partnership between himself and Brazier was dissolved, and all the debts paid; that the liquidators had realised the landed property mortgaged to Myburgh & Co., and after paying the amount due by the petitioner's late firm to Myburgh & Co., there remained a balance of £229 0s. 1d., which balance they refused to pay to petitioner without the authority of Brazier; that petitioner had paid £1,000 into the capital account of the partnership, whereas Brazier put in nothing, but was entitled to one-third of the profits; that Brazier had drawn out of the business all that he was entitled to; that the private property of petitioner mortgaged to Myburgh & Co. had also been realised by the liquidators. As to Brazier's whereabouts, he said they were unknown to him, but he was reported to be in the Transvaal or Rhodesia.

Mr. McGregor appeared for the applicant.

There was no appearance for the liquidators, but Mr. McGregor, on their behalf, read a letter received by them from Winburg, Orange Free State, in which the writer declared that he knew where Brazier was to be found.

The Court granted a rule calling upon Brazier to show cause why this payment should not be made, personal service to be effected.

Mr. McGregor asked for alternative service.

De Villiers, C.J., said it was important that Brazier should receive notice, because he might have something to say in the matter. It was quite clear the firm was entitled to the money; the only question was whether the petitioner was entitled to the whole of it.

The rule was made returnable on June 13, with leave to apply again if personal service could not be effected.

INSOLVENT ESTATE OF W. J. HANCOCK.

Mr. Maskew applied on behalf of creditors for the appointment of a provisional trustee in the insolvent estate of W. J. Hancock. The petition stated that amongst the assets in the insolvent estate there was a grocer and general dealer's business at Observatory-road, carried on by insolvent under the style of Hartley & Co. It was in the interests of the creditors that a provisional trustee should be appointed at once. It was therefore asked that Mr. G. W. Steytler be appointed provisional trustee, with power to carry on the business. The petitioning creditors were the Cape of Good Hope Building Society, to whom there was due, as far as could be ascertained by the auditors, £13,000, and Mr. Marsh, to whom there was £1,200 due.

The order was granted as prayed.

MILLS V. BARKER.

Mr. Ashburnham asked for an extension of the return day of the edictal citation in this case to June 13.

The extension was granted as prayed.

Ex parte BLEKSLEY.

This was an application by the plaintiff Alice Mary Bleksley, for leave to sue her husband *in forma pauperis* in an action for nullity of marriage on the ground that he had been previously married.

Mr. Currey for the applicant.

Alice Mary Bleksley said that she was married on October 5, 1888, and discovered in 1890 that her husband had been previously married. She had not brought her action before, because until recently she had not been able to get evidence together. She had no means. She was a nurse, and had to support herself and her mother.

The Chief Justice said that as this was a special case for nullity of marriage, and not an ordinary divorce case, the order would be granted.

SPANGENBERG V. G. FINDLAY AND CO. { 1898. May 12th.

Bill of exchange—Proof of presentment for payment—Act 19 of 1893, section 44.

The payee of a bill of exchange having sued the drawer in a Magistrate's Court, the Magistrate gave judgment for the plaintiff without having had any proof of presentment for payment to the drawee or proof that presentment was dispensed with by virtue of Act 19 *of* 1893, *section* 44.

Held on appeal, *that the decision was wrong.*

This was an appeal from a decision of the Acting Resident Magistrate of Upington in an action in which respondents sued the appellant upon a bill of exchange for £100, dated the 21st August, 1890, drawn by the appellant in favour of the respondents, and addressed to Mr. C. van Zyl.

The summons alleged that the bill had been dishonoured on presentation, but did not state to whom it had been presented.

It appeared that at the trial the plaintiffs' attorney put in the document and a certificate of presentation to the drawer, dated 21st August, 1897. The defendant in his plea denied liability, and his attorney applied for absolution from the instance on the ground that the document put in was not an acknowledgment of debt, and that there was no proof of presentation. The plaintiffs' attorney then tendered his evidence in the matter to put in certain correspondence, and applied for interrogatories in support of the debt. The defendant's attorney objected to this on the ground that the plaintiff must stand or fall by the document. The Magistrate held that the document was a liquid one, as it showed a *prima facie* presumption of indebtedness, which must be rebutted by the defendant; that therefore it was not necessary to hear the evidence offered on behalf of the plaintiffs, or to obtain interrogatories. The defendant's attorney declined to prove that there was no liability, and appealed against the decision.

The Magistrate forwarded the following reasons: It appeared to me that the document sued upon, supported by the allegations in the summons, raised a sufficient *prima facie* presumption of indebtedness by the defendant to the plaintiffs for me to hold that the document was a liquid one; and that the defendant should rebut this presumption in support of his plea. The defendant could not have been prejudiced by this ruling as he was a resident in the town of Upington, and could then and there have given his evidence in support of his plea. His conduct in declining to accept my ruling to rebut the plaintiffs' claim appeared to me to be vexatious, especially as he maintained himself that the plaintiffs should stand or fall on the document put in. I therefore had no alternative but to give judgment for the plaintiffs as prayed.

Mr. McGregor appeared for the appellant.

Mr. Jones for the respondents.

Mr. McGregor: Act 19 of 1893, section 35, requires presentment for payment, but there is no proof of such presentment.

[De Villiers, C.J.: That is clear law. But has there been no waiver of presentment].

The presumption is against waiver. It must be proved by the plaintiff.

Mr. Jones: I admit that there should be presentment for payment except in certain cases mentioned in Act 19 of 1893, section 44, sub-section (2). But the summons alleges presentment and the want of presentment was not the real objection taken. The ground of appeal really was that this was not an acknowledgment of debt and the object was to oust the Magistrate's jurisdiction. The Magistrate was right as to the presumption of indebtedness; it was a question of fact for him to decide; the presumption might have been rebutted by the defendant but he refused to do so. If proof of presentment had been required the plaintiff's attorney might have given that proof or proved that presentment was dispensed with under the Act. Inasmuch as he tendered his evidence and the Magistrate refused to hear it, the matter in any case ought to be remitted to him that the evidence may be taken.

The Chief Justice said: This action was upon a draft made by the drawer or defendant as far back as August 21, 1890. It is drawn upon Mr. Van Zyl, presumably the attorney Mr. C. H. van Zyl, and reads: "Please pay to the order of George Findlay & Co. the sum of £100 sterling." Mr. Van Zyl is an old attorney of this Court, and if there had been a presentment to him for payment the proof would have been easy but defendant is brought into court now without any proof of presentment for payment to Mr. Van Zyl. The objection was therefore taken that there was no proof of presentment. That objection could only apply to the demand on the acceptor, because as a matter of fact there was a certificate put in of presentment on the drawer. The Magistrate, however, gave judgment for the plaintiff, on the ground that this is a liquid document, and that the presumption is that the defendant is liable. Of course he is liable, but subject to the provisions of the law, and there is no provision that the drawer of the bill of exchange is liable unless there is a proof of presentment to the drawee for payment. There are certain exceptions to this general rule, one of these exceptions being given in sub-section 2c of section 44 of Act 19 of 1893: "Presentment for payment is dispensed with as regards the drawer where the drawee or acceptor is not bound as between himself and the drawer to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented." It lies upon the plaintiff to prove that in order to dispense with presentment for payment. That fact ought to have been proved in this case in order to justify the Magistrate giving judgment for the plaintiffs. It is clearly here that the Magistrate was wrong. If it had not been such a stale bill the Court might have referred the case back to the Magistrate for evidence. Under all the circumstances, I think that the plaintiffs ought to have been prepared at the trial with either proof of presentment to the drawee or proof that the presentment was dispensed with. For these reasons I am of opinion that the appeal must be allowed with costs.

Buchanan and Maasdorp, J.J. concurred.

[Appellant's Attorneys, Messrs. Walker & Jacobsohn; Respondents' Attorneys, Messrs. Findlay & Tait.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

WEBER V. WEBER. { 1898. May 13th.

Mr. Molteno asked for a commission to take the evidence of plaintiff and another witness in this action. The action was one for restitution of conjugal rights. The plaintiff, Mary Ann Florence Weber, was married to defendant on July 12, 1894, but he deserted her in February, 1896. Plaintiff resided in Burghersdorp, and had no means of her own. Defendant resided in Queen's Town, and personal service of notice of the application had been effected on him. Defendant had entered no appearance to the action, and had not answered plaintiff's letters for a considerable time. The Resident Magistrate of Burghersdorp was suggested as commissioner.

The Court granted the order as prayed, and appointed the Resident Magistrate of Burghersdorp as commissioner. The Court also directed that notice be given to the defendant of the date of the sitting of the commission.

CLARKE V. CLARKE. { 1898. May 13th.

This was an action for divorce brought by Henry Clarke against his wife, Bridget Clarke (born Kershaw), on the ground of her adultery. Plaintiff also asked for the custody of the three children of the marriage.

Mr. Close appeared for the plaintiff; there was no appearance for the defendant.

R. D. H. Barry. clerk in charge of the marriage registers in the Colonial Office, put in a certificate of marriage of the plaintiff and defendant at Cape Town on February 5, 1890.

Henry Clarke, the plaintiff, stated that he came to South Africa in 1888 as a sapper in the Royal Engineers. He purchased his discharge from the Royal Engineers in 1890. After marriage witness and defendant lived for some time in Cape Town. In March, 1893, he went to the Transvaal in search of work, his wife remaining in Cape Town. He returned in September of the same year, but. in September of 1896 he again went to the Transvaal, leaving his wife and the three children of the marriage settled in Denmark-terrace, Loader-street. He sent defendant £10 a month for the support of herself and the children. Defendant's sister, Mrs Johnson, whose husband died in the Transvaal, went to live with her afterwards. While in the Transvaal he corresponded regularly with the defendant. He never had any suspicion that anything was going wrong. He was working at the Glenluce Mine, which is amalgamated with the Glencairn Company. On January 11 his wife unexpectedly paid him a visit, bringing one of the children with her. She arrived early in the afternoon, but it was not until night, when it was about time to retire, that she confessed to him that she had gone wrong. When she made that confession witness told her he would divorce her. To save scandal, and for the sake of the child with her, he allowed her to sleep on a mattress in the room that night. He arranged for her to leave the next day for Cape Town, but on coming home from work that night he found she had not left, and he again allowed her to remain in the room. He never cohabited with her after she confessed that she had commited adultery. In a letter to witness, dated March 16 last, defendant stated that the person with whom she had committed adultery was Sergeant McBeath, of the King's Royal Rifles. The children of the marriage were aged eight, six, and four years respectively. Witness had made satisfactory arrangements for the care of the children, who were to be taken charge of by the Sisters of Nazareth.

By the Court : Defendant had not expressed any desire to keep any of the children.

Mrs. Annie Johnson, sister of the defendant, stated that she lived with her sister in Denmark Terrace, Loader-street. Sergeant McBeath was often at the house, and was very intimate with the defendant. They would sit together on a chair, and after witness had retired they were together until very late. Witness often spoke to her sister about the matter, telling her that people were talking about her, and that she was going too far, but her sister told her to mind her own business, and that she (defendant) was no worse than anybody else. Witness knew that defendant was very fond of Sergeant McBeath, and that Sergeant McBeath was fond of defendant. Witness knew that defendant was expecting a confinement.

John McBeath, sergeant in the King's Royal Rifles, admitted his misconduct with the defendant.

Mr. Close, in answer to the Court, said he would not press for costs.

De Villiers, C.J.: The admission of adultery has been sufficiently corroborated. Judgment will be granted as prayed, including the custody of the children, but no order will be made as to costs.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

LEICESTER BRILLIANT SYNDICATE v. THE COLONIAL GOVERNMENT AND THE NEW ELANDSDRIFT MINING AND ESTATE COMPANY.

1898.
May 13th.
„ 16th.

Diamond Mine—Claim—Depositing site — Rent—Duress—Protest—*Restitutio in integrum—Condictio indebiti.*

A claimholder to whose licensed claims there has been attached the right to use and occupy the requisite depositing sites is liable to pay to the owner of the soil the rent authorised by the 35th section of Act 19 of 1883, even although he does not occupy or require such claims.

Such right is sufficiently attached after a rough plan has been made by direction of the Commissioner of Crown Lands indicating the depositing sites available for the claimholder and binding on the owner of the soil.

In an action in the nature of restitutio in integrum *for relief against a payment alleged not to have been legally claimable a protest made on one ground against the payment cannot be made use of for the purpose of recovering, on a wholly different ground, the money thus paid.*

This was an appeal from a decision of the High Court of Griqualand West in an action in which the appellant company was sued for the sum of £493 10s., viz., £164 10s., licence money on forty-seven claims from the 2nd September, 1896, to the 2nd April, 1897, at 10s. per claim per month, and £329, being rent for depositing sites for the same period at 20s. per month per site.

The claim of the Government was set forth in the following declaration :

1. The plaintiff is Henry Martyn Herbert Orpen, the Receiver-General of Revenue in this colony, and the proper person to sue in this case.

2. The defendant is a duly registered company under Act 25 of 1892, and as such is liable to be sued in its corporate name.

3. On or about the 30th day of April, 1895, a proclamation (annexed) was issued by the officer then administering the Government, proclaiming a spot known as Leicester's Prospect, situated on farm No. 8, Eland's Drift, in the division of Barkly West, to be a mine within the meaning of Act 19 of 1883.

4. On and after such proclamation all due steps were taken as by law provided, and claims were duly allotted.

5. The defendant company duly acquired and received certificates of registration, in the names of their accredited agents, of

forty-seven claims in the said mine, the numbers and descriptions of which are more fully set forth in the annexed schedule.

6. Under the proclamation above referred to, it is proclaimed, declared, and made known, *inter alia*, that every holder of every certificate of registration under sections 20 and 21 of the said Act 19 of 1883 shall, in addition to the sum of 10s. sterling, which has to cover each such certificate as aforesaid, pay to the Inspector of Claims, or other officer appointed to receive such payment, the sum of 20s. sterling monthly in advance for the right attached to each claim to use and occupy one acre of ground for the purpose of a depositing site, under the provisions of section 35 of the Act aforesaid.

7. That ground for the said depositing sites was offered by the said Inspector of Claims, and was at all times available for the use of the said defendant company to the extent required by law.

8. Since the 2nd day of September, 1896, although the said claims are still registered in the name of the said defendant company, the said company has refused, and though requested so to do, still refuses to pay the claim and depositing-site licences due to the Government.

9. By reason of the said default the plaintiff, in his said capacity, is entitled to the sum of £493 10s., calculated at the rate of 30s. per month for forty-seven claims, from September 2, 1896, to April 2, 1897.

Wherefore the plaintiff, in his said capacity, claims:

1. The sum of £493 10s.
2. Interest *a tempore moræ.*
3. Alternative relief.
4. Costs of suit.

The second-named plaintiffs, to whom leave had been given to intervene, alleged in their declaration that they were a joint stock company, registered under the Act 25 of 1892, and had their head office on farm No. 8, Eland's Drift, in the district of Barkly West; that they were the registered owners of the farm No. 8, Eland's Drift, on which the mine and depositing sites referred to in the declaration of the first-named plaintiff are situate.

They referred to paragraphs 2, 3, 4, 5, 6, 7, 8, and 9 of the first-named plaintiff's declaration, and prayed that they might be considered as inserted herein.

They joined in the prayer of the first-named plaintiff in so far as it referred to the moneys due for depositing sites, and further prayed for costs of suit.

The defendant company (now appellants) filed the following plea:

1. The defendant admits paragraphs 2, 3, and 5 of the declaration. Save as hereinafter admitted the defendant denies all the other allegations in the said declaration.

2. The defendant company admits paragraph 1 of the said declaration save that it denies that the plaintiff is the proper person to sue for rent for the said depositing sites.

3. With regard to paragraph 6, the defendant refers to the said Proclamation for the terms thereof, and says further that the 3rd section of the said Proclamation is *ultra vires* the Government.

4. No depositing sites were ever offered or allotted to the defendant company; no sites were ever received or used by the said company; there is not sufficient ground available at the said mine to allot depositing sites to the said defendant company.

5. The defendant has paid the sum of £496 in respect of depositing sites in connection with the said claims, but the said sum was paid under protest, and the defendant contends that the said company was not liable therefor.

6. The defendant admits that the said company is liable for the sum of £164 as and for licence moneys in respect of the said claims, but defendant contends that he has the right to set off against the said £164 an equal amount of the £496 in paragraph 5 above mentioned.

7. Save as above the defendant admits paragraph 8 of the declaration.

Wherefore defendant claims judgment and costs.

Defendant's claim in reconvention:

1. The defendant craves leave to refer to the pleas herein, and says that the company is entitled to claim the difference of the said £496 in paragraph 5 of the said pleas, and the sum of £164 mentioned in paragraph 6 thereof.

The defendant claimed the sum of £332 and costs.

Pleas to declaration of second-named plaintiff:

The defendant company admits paragraphs 1 and 2 of the declaration of the second-named plaintiffs, and for further reply to the said declaration refers this Honourable Court to paragraphs 1, 3, 4, 5, 6, and 7 of the plea of the first plaintiff's declaration, and prays for judgment with costs.

Claim in reconvention:

The defendant company refers this Honourable Court to the claim in reconvention against the first-named plaintiffs, and claims judgment as therein mentioned with costs of suit.

First-named plaintiff's replication and plea to claim in reconvention :

1. The first-named plaintiff admits that the defendant company paid the Inspector of Claims £496 for rent of the depositing sites in question, but denies the right of the defendant company to set off any portion of that sum against the sum of £164, which the defendant admits to be due to the first-named plaintiff for licence moneys.

2. The first-named plaintiff denies the other allegations contained in the pleas, except so far as they admit the allegations contained in the declaration.

And for a plea to the defendant's claim in reconvention, the first-named plaintiff denies the allegation therein contained, and prays for judgment for £164 with costs of suit.

Replication and plea to claim in reconvention of the second-named plaintiff :

1. The second-named plaintiff joins issue with the defendant company on its pleas, save in so far as the said pleas admit the allegations in the said plaintiff's declaration.

1. For a plea to the claim in reconvention the second-named plaintiff denies the allegations therein contained, and prays that the said claim may be dismissed with costs.

On these pleadings issue was joined.

The Court gave judgment for the plaintiffs as prayed, with costs.

From this judgment the present appeal was brought.

Mr. Schreiner, Q.C., and Mr. Jones for the appellants.

Mr. Sheil for the Government.

Mr. Solomon, Q.C., and Mr. Currey for the New Elandsdrift Company.

Mr. Schreiner, Q.C. : The point in appeal is whether section 35 of Act 19 of 1883 entitles the owner of property on which a mine is situated to the rent for a depositing site immediately a claim is taken out and whether or not a depositing site is occupied or allotted. Section 34 must be read together with section 35, and therefore a survey must be made at any rate before rent can be claimed. No survey was made by the Commissioner under section 34 until May, 1896. It is admitted that up to March, 1896, there was not sufficient land to allot to all the claimholders as depositing sites. In May, 1896, only 44 sites were allotted although we then had 47 claims ; and we are charged for sites in respect of 47 claims at this time. In January, 1897, a fresh plan was made and we were allotted 50 sites.

[De Villiers, C.J. : Was the surveyed portion beaconed off ?]

The evidence does not show that.

[De Villiers, C.J. : After survey has been made and a plan framed I should think that the owner could make no use of the land.]

I cannot entirely admit that if it was clear that the owner had notice from the claimholders to the effect that they did not want sites. Even if the judgment in *Colonial Government* v. *Redoubtable D. M. Co.* (High Court, 3rd September, 1896) is a good judgment it does not govern this case, because there the sites had been actually taken. Here there were only 1,000 sites available for 1,400 claims until Van Zoelen's Laagte was acquired. At that time we had already paid £200. The owner is entitled to warn the claimholder that if he says he does not want depositing sites he the owner) will make other use of the ground and will not be bound afterwards to provide them. The appellants showed a waiver of their right by the letter written on the 11th July, to which no reply was received.

[De Villiers, C. J. : Even if the proclamation goes further than the statute, it may be that the proclamation binds the parties as by contract.]

That point was not taken below and cannot be made where there is a statutory right. The appellants moreover were not the original claimholders.

The claim holder has only to pay for the "site," and "site" does not mean "right." If the respondents' contention is correct then the claimholder must pay as soon as the claim is taken out. Even if the *Redoubtable* case lays down good law, "available ground" must be surveyed ground. There was no survey until May, 1896, and at that time there were clearly no sites available for all claimholders ; and at that time we had paid £177 under protest.

As an illustration of the intention of the Legislature see Proclamation 8 of 1880 (G.W.), Part 4, sections 4 to 10.

The amounts paid under protest were paid under duress ; the claims would otherwise have been forfeited at some time and it is clear that they could not be transferred or hypothecated. *White Brothers* v. *Treasurer-General* (2 J., p. 322). We are entitled in any case to a refund of more than £200, including £15, the difference between the rents for 44 claims and for 47 claims.

Mr. Solomon, Q.C.: The sites were available from the date of proclamation. The High Court found that they were available throughout the entire period, and the evidence supports this. Section 35 of the Act is intended not only to give the claimholder facilities for working but to provide compensation to the owner for the statutory disturbance of his land.

[De Villiers, C. J.: The Act seems to assume that the owner has a large extent of land round the mine. But, supposing he has not, can the Government provide depositing sites on other lands?]

If the right to precious stones on the other land is reserved in favour of the Crown. Section 34 is very wide. The land is of no use to the owner after it has once been allotted as depositing sites. If he uses it for any other purpose any claimholder may say that he wants it. The claimholder cannot waive his right: it is attached to the claim and any future claimholder can enforce it. Every transfer carries the right with it. *Bultfontein Mining Board* v. *Armstrong and the London and S.A. Exploration Co.*, (8 J., p. 236). As soon as the expropriation takes place and the sites are available the claimholder becomes liable: but unless they are available he is not liable. The term "depositing site" is only used in sections 31, 34 and 35. Section 31 provides clearly that in the case of abandoned mines the lessee shall pay for the ground he requires for depositing sites, &c. If that had been intended by section 35 also, similar language would have been employed.

[De Villiers, C.J.: Why does the owner of an abandoned mine get worse terms than the owner of a working mine?]

He gets compensation under section 33. *Scott* v. *Gillet* (5 Sheil, p. 296) is a case somewhat similar to this. As to the claim in reconvention, some of the payments paid under protest were certainly paid in order to get transfer and I admit that these sums should be refunded if the respondents were not entitled to claim them. The other payments were not made under duress: the claims could not be forfeited by non-payment; Government could only sue for the rents; neither would the claims be abandoned; section 28 refers only to alluvial diggings.

Mr. Schreiner: *Armstrong's* case is a very strong authority for the argument that survey is not a practical expropriation. The point was taken there that the soil was expropriated from the owner. Section 34 is not *per se* an authority for that view. A claim once licensed is not always licensed: it may be abandoned A mine may also be abandoned; the effect of that is that it is closed. In case the licences are not paid for two months in respect of one-tenth of all the claims the mine may be proclaimed as abandoned. Therefore there was duress in the refusal to give receipts of claim licences without payment of the depositing sites rent. There is nothing in the Act to show that a claimholder cannot renounce his right and bind his transferee.

Postea (May 16th).

De Villiers, C.J., said: The plaintiffs in the Court below sought to recover from the defendant company the sum of £493 10s., as being due under the 35th section of Act 19 of 1883 for forty-seven depositing sites, the right to the use of which was attached to forty-seven licensed claims in the Leicester Diamond Mine. The period for which this charge is made was from the 2nd of September, 1896, to the 2nd of April, 1897. Before the 2nd of September, 1896, a rough plan had been made by direction of the Government indicating the depositing sites available for the use and occupation of the claimholders, including the defendant company, but the company never occupied the sites allotted to it. The first question to be determined is whether, notwithstanding such non-occupation, the defendant company is liable to the charge of £1 per month in respect of each depositing site to the plaintiff company as owner of the soil. It should be observed at the outset that although the defendant company has refused to pay the charge, there has been no disclaimer or renunciation on the part of the company of its right at any time to use and occupy the sites allotted to it. It is unnecessary now to decide what effect such a renunciation, if made, would have had on the company's liability to pay for the use of the sites, but it is obvious that, at all events, until such a renunciation is formally made the owners of the soil are as much deprived of the use of the sites as if these sites had been actually occupied by the defendant company. It would be impossible for the owners to use the land cut off on the plan for any beneficial purpose if, at a moment's notice, they may be compelled to relinquish it for the purposes to which it has been allotted. To all intents and purposes the land has been expropriated, and the real question is whether compensation is payable for such practical expropriation. If none is payable there appears to be no provision in this Act for compensating the owner in some other way, direct or indirect, for damage done to his land by mining. The 33rd section of the Act provides for compensation for surface damage so done in the case of alluvial diggings or of abandoned mines, but not in the case of mines which have not been abandoned, and which are situate on land the title to which is subject to a reservation to the Crown of precious stones or minerals. It is noteworthy that upon the lease, under the 31st section, of an abandoned mine on land which is subject to such a reservation, the compensation payable to the owner for the depositing sites is for the ground actually required by or leased to the lessee. The 35th section, however, which deals with mines not so abandoned, requires that to every licensed claim there shall be attached the right to use and occupy one acre of ground in the neighbourhood of the mine, and that in respect of such depositing site the owner of the soil shall be entitled to charge a sum not exceeding £1 per month, payable in advance. It is not, therefore, for the actual occupation that the charge is authorised, but for the attachment to such licensed claim of the right to occupy the allotted site. On behalf of the appellants it has been contended with much force that a survey under the 34th section is a condition precedent to the right to receive rent under the 35th section, and that such survey should be complete, so as to mark off each depositing site. Such survey as was required for the rough plan made before September, 1896, was necessarily very incomplete, but if the rough plan sufficiently indicated the area available for the defendants' use the owners of the land would lose all control over that area. This seems to me to be the real test in the case. If the owners' right to the use of the land was lost, the claimholders' right to the use and occupation of the land was complete, and so was their consequent liability for rent. In my opinion, therefore, the Court below has correctly decided that the plaintiffs are entitled to recover the sum demanded in the claim in convention. A more difficult question is raised by the claim in reconvention in which the defendant company seeks to recover back rent paid for depositing sites before any plan marking off the area available for depositing sites had been framed. The Court below was satisfied that the sites have always been available for the claimholders' use, but until the Commissioner of Crown Lands had caused a particular portion to be reserved for the use of the claimholders the owners of the land cannot be regarded as having been deprived of the right to the use and occupation. I therefore incline to the view that if the defendant company had protested against payment of rent on the distinct ground that there was not an authoritative plan indicating the land to be used as depositing sites, and had paid the money solely for the purpose of preventing a forfeiture of its mining claims, it might have received back the money so paid. But it is obvious that if any objection had been raised on the ground of the absence of such a plan, the defect could and would have been immediately cured. Even after a plan had been framed the company continued to pay under protest, thus showing that the protests were really directed against payment without beneficial occupation, and not against payment without a plan indicating the sites available for occupation. The position taken up by the company was pithily expressed by its secretary in his evidence. "Our contention," he said, "is that we are not bound to pay for sites unless we want them, and they are actually surveyed and available." It clearly would have been a nugatory act for the plaintiffs to prepare a rough plan, or even to make a complete survey detailing each depositing site, for the company would still have protested against payment without beneficial occupation. The company does not seek to recover back the money on the ground of mistake of fact or of law. If mistake of fact had been relied upon an action in the nature of a *condictio indebiti* would have been the proper remedy, but for a mistake of law there would have been no remedy. But the grounds relied upon are that the payments were made under duress and that inasmuch as they were paid under formal protest they may now be recovered back. In my opinion the protest was wholly insufficient. In the case of *White Bros.* v. *Treasurer-General* (2 Juta, 322), the head-note of which is somewhat incorrect, it was held that there was not sufficient proof of duress in the absence of any unequivocal protest against the payments there sought to be recovered back. It was pointed out that such an unequivocal protest would have resulted in steps being taken for the removal of all technical objections to the levying of duties demanded.

In the same way, in the present case, if the company had confined itself to a protest against payment on the ground that there was no indication in any plan of the land set apart for depositing sites the owners would have taken immediate steps to remedy the defect. A protest made on one ground against the payment of money cannot, in my opinion, be made use of for the purpose of recovering, on a wholly different ground, the money thus paid; more especially in a case like the present, where the person receiving the payment could immediately have cured the illegality if the wrong ground had not been insisted on. It follows that the relief of *restitutio in integrum* is not applicable to the present case, and that the claim in reconvention cannot be allowed. The appeal must be dismissed with costs.

Buchanan, J., concurred.

Maasdorp, J., said: I concur in the judgment. The defence in this case is set forth mainly in the fourth paragraph of the defendants' plea, in which they state that no depositing sites were ever offered or allotted to them, no sites were ever received or used by them; there is not sufficient ground available at the said mine to allot depositing sites to them. It was also contended on their behalf that it was at their option to accept or refuse to take any depositing site which might be allotted, and that upon their declining to accept such sites they would not be liable to any charge in respect thereof. The defence involves issues of fact and law. It must be obvious to anyone acquainted with the diamond mines of this country that the possession of a depositing-floor in the neighbourhood of a mine is essential to the beneficial working of any claim in the mine, that, indeed, such depositing-floor is indispensable. In the absence of statutory provision on the subject, the claimholder would be obliged to secure the necessary ground by contract with the owner of the land adjoining, who is generally also the owner of the land on which the mine is situated. It is also obvious that in such agreements the claimholder would be at a disadvantage, and the landowner might drive a hard bargain. To meet this difficulty it was provided in Proclamation No. 8 of 1880, following upon the lines of previous legislation, but defining more clearly the rights and obligations of the parties interested, that every claimholder shall be entitled to the use, within a reserved area outside the mine, of a depositing-floor of given extent, to be allotted in respect of the claim held by him, and to be marked off with beacons by the Inspector of Mines, for which the claimholder shall pay a certain rent to the owner. I refer to this law for the purpose of pointing out what seems to me to be a difference of more or less importance between its provisions and that of Act 19 of 1883, which may throw some light on the intention of the Legislature in later Act. This Proclamation seems to constitute what may be called a statutory contract of letting and hiring between the claimholder and the landowner, and provides for the payment of rent by the claimholder. There was therefore created what was in the nature of a personal contract between the parties. Whatever the effect of that relationship may have been, I think, having regard to the wording of section 35 of Act 19 of 1883, a change was made in this respect by that Act. It is there provided (section 35), amongst other things, that "To every licensed claim there shall be attached the right to use and occupy an acre of ground hereinafter called a depositing site, and in respect of every such depositing site the owner of the soil shall be entitled to charge a sum not exceeding £1 per month, payable in advance." It seems to me that this has the effect of creating a servitude in favour of a licensed claim, as the dominant tenement, against the land of the landowner, or a certain defined portion thereof as the servient tenement. Any claimholder, upon acquiring his claim under the Act and the Proclamation referred to in the declaration, takes with it, as incident to his tenure, the right thus attached to it, together with the burdens and obligations attached to such right. Now this servitude in favour of a licensed claim is to be exercised over a definite portion of the reserved area, which is to be determined and allotted by a duly authorised Government officer. Until such portion has been defined, and notice has been given to the claimholder that it has been allotted and that the ground is at his disposal, he will not be in a position to exercise his right of use and occupation, nor will the owner of the land be entitled to make any charge, because there will be no such depositing site in existence in respect of which he is under section 35 entitled to make a charge. I am therefore of opinion that until the exact site and area of a depositing floor has been fixed and determined, and notice given to the claimholder that it has been allotted in respect of his claim, no charge can be made by the landowner, but as soon as this has been done he will be entitled to charge. It appears that all the charges made in the plaintiff company's claim accrued after the reserved area was surveyed, and a certain defined area was assigned as depositing grounds to the claims held by the defendant company, of all of which the secretary of the defendant company had notice. It seems to me that the right of use and occupation of the depositing site is not conditional upon the payment of the landowner's charge, but continues whatever the claimholder's indebtedness may be, and passes with the claim when that changes hands. Nor on the other hand is the owner's title to make the charge dependent upon the election of the claimholder to enter upon or continue the use and occupation of the site, or not to do so. It is consequently no answer to the plaintiffs' claim, that the defendants did not require the depositing site, and did not accept the allotment thereof made by the Inspector of Claims. Upon the questions raised in the fourth paragraph of the plea it must be decided that sites were allotted and placed at the disposal of the defendants: that there was sufficient ground available for the purpose, and notwithstanding the fact that they did not enter upon and use the sites, they are liable to pay the landowner's charge. I am of opinion that the plaintiff company is entitled to succeed on their claim in reconvention. I also concur in the judgment in the claim in reconvention.

De Villiers, C.J., addressing Mr. Schreiner: There is one part of the argument I did not quite follow, viz., with regard to the forty-four claims. I understood Mr. Schreiner to say that for a time at all events there were three acres not available. But one of the witnesses, Franklin, said that at that time defendants had forty-four claims, for which they had depositing sites belonging to them, and when the defendants got three more claims they got three more depositing sites.

Mr. Schreiner: It appears from the evidence of Woolley on the record that the defendants did not get possession of those three sites until the end of January, 1897, whereas they were called upon to pay for them five months previous to that, the amount coming to £15.

De Villiers, C.J.: It is quite consistent with the evidence that the ground set apart included sites for those three claims. At all events, the point is so obscure that I do not feel justified in altering my judgment.

[Appellants' Attorneys, Messrs. Scanlen & Syfret; Attorneys for the New Elandsfontein Company, Messrs. Fairbridge, Arderne & Lawton: Attorneys for the Government, Messrs. J. & H. Reid & Nephew.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

TORVA EXPLORING SYNDICATE LIMITED V. KELLY.—TORVA EXPLORING SYNDICATE, LIMITED V. MOCKS.—TORVA EXPLORING SYNDICATE, LIMITED V. LAMB, N.O. } 1898. May 16th.

"Flotation"—Claims—Prospector—Company—Gold mining.

The plaintiff, being a "prospector," acquired for the defendant certain gold-mining claims in Matabeleland under an agreement whereby he was to receive payment of a certain sum on "flotation" of the claims by the defendant.

Held, confirming the judgment of the High Court of Matabeleland *that the sale and transfer of the claims by the defendant to a company formed for the purpose, amongst others, of gold-mining constituted such "flotation" and entitled the plaintiff to payment of the stipulated sum.*

These were three appeals from decisions of Mr. Justice Vintcent in the High Court of Matabeleland in February last. In the original actions the respondents were the plaintiffs and sued the appellants upon certain contracts of agreement.

The main point of issue was the same in each case—namely, what was the meaning of the term "flotation" in the contract, and it was decided by consent of counsel to hear the three appeals simultaneously.

The pleadings and other documents put in in Kelly's case and set out below, indicate also the nature of the case of the other plaintiffs and the defence thereto. Kelly claimed £8,250 on 330 claims at the rate of £250 for every block of ten claims: Mocks claimed £750 on thirty claims, and Lamb, as executor of one Robert White, claimed £500 on twenty claims at the same rate.

The following was the declaration of the plaintiff Kelly :

1. The plaintiff is a prospector residing at Bulawayo. The defendants are a joint-stock company incorporated in England under the Companies Acts, 1862 to 1893, with limited liability, and have an office and carry on business in Bulawayo.

2. On or about the 17th July, 1894, an agreement in writing, which is annexed hereto and which the plaintiff craves leave to refer to, was entered into by and between the plaintiff and one Frederick Hugh Page Cresswell, in his capacity as manager and acting for and on behalf of the defendant company, whereby in consideration that the plaintiff would give his exclusive services as a prospector to the defendant company for the period mentioned in said agreement, and would transfer into the name of the defendant company all mining claims he might peg whilst in their employ as aforesaid, the defendant company agreed to pay to the plaintiff the sum of £250 on flotation by the defendant company of every block of ten claims pegged by him as aforesaid.

3. The plaintiff duly performed his part of the said agreement, and pursuant thereto pegged and transferred to the defendant company 330 claims.

4. On or about the month of March, 1895, and subsequent to the transfer of the said claims by the plaintiff to the defendant company, the latter duly floated the same within the meaning of the said agreement by selling and transferring them to the Charterland Gold-fields (Limited), a company incorporated in England with limited liability ; and thereupon the plaintiff became entitled to be paid by the defendant company the sum of £8,250.

5. In the alternative (if this Honourable Court should hold that the said claims have not been floated by the defendant company within the meaning of the said agreement, but not otherwise), the plaintiff says that the defendant company was bound in law under the said agreement to float the said claims within a reasonable time, and that the defendant company, in breach of the said agreement, have failed and neglected to float the same within a reasonable time and in accordance with their duty in that behalf ; and further, in breach of the said agreement, have transferred and divested themselves of all control over the said claims, whereby the plaintiff has sustained damage to the amount of £8,250.

6. The plaintiff has demanded payment of the said sum, but the defendant company refuse, and still refuses, to pay the same or any part thereof ; and all things have happened, all times have elapsed, and all conditions been fulfilled necessary to entitle the plaintiff to bring this action.

Wherefore the plaintiff claims : (1) Payment of the sum of £8,250, as set out in paragraphs 2, 3, and 4 hereof ; (2) or in the alternative £8,250 damages, by reason of the breach alleged in paragraph 5 hereof ; (3) interest *a tempore moræ* ; (4) such further or other relief as to this Honourable Court may seem meet ; (5) costs of suit.

Copy of Agreement.

Memorandum of agreement made and entered into this 17th day of July, 1894, at the Fort Selookwe Hills, Matabeleland, by and between Frederick Hugh Page Cresswell, on behalf of the Torva Exploring Syndicate (Limited), of the one part (hereinafter called the syndicate), and Martin Francis Kelly, of the other part (hereinafter called the prospector).

Whereas the prospector has agreed to do certain prospecting work for the syndicate on terms and conditions hereinafter set forth.

Now therefore these presents witness :

1. The syndicate hereby hires the prospector for a period of two (2) calendar months, and for a further period of one (1) calendar month if required, commencing from the date of the agreement inclusive.

2. During the continuance of the said two or three months, if required, the prospector shall devote all his time and attention to the interests of the syndicate, and shall use his best endeavours to peg off payable mining properties in Matabeleland or Mashonaland, and will not be allowed to do any work on his own account or on that of any other person or persons whatsoever other than that of the syndicate.

3. It being agreed between the said parties that the agreement shall cease and determine from the date of any proclamation of

martial law or further hostilities with the natives, necessitating suspension of prospecting work.

4. In consideration of the services rendered by the prospector, the syndicate shall pay him a monthly salary of £15 (fifteen pounds), and shall equip him with all the necessary prospecting gear and provisions.

5. Should the prospector peg off any mining property or properties, he shall inform the syndicate's representative thereof, and the development or abandonment of such property or properties shall be at the discretion of the syndicate's representative.

6. All claims pegged off by the prospector shall be transferred to the syndicate.

7. The prospector shall receive from the syndicate the sum of £250 on flotation by the syndicate of every block of ten claims pegged by the prospector.

The defendants' plea was as follows :

For a plea to the plaintiff's declaration the defendant syndicate says :

1. They admit the allegations in paragraphs 1 and 3 of the said declaration contained, save that they say that the licences upon which the said claims were pegged were the property of the defendant syndicate.

2. They admit the execution of the agreement referred to in the second paragraph thereof.

3. As regards paragraph 4 thereof, they admit that the said claims have been transferred to the Charterland Gold-fields (Limited) ; but they deny that such transfer constitutes flotation within the meaning of the said agreement, and that any sum of money is due to the plaintiff in respect of such transfer.

4. They admit the demand and refusal in the sixth paragraph mentioned, but deny the other allegations therein.

5. For a plea to the alternative claim in paragraph 5 contained, they deny that they were bound to float the said claims within a reasonable time, or at all ; they deny that the said agreement has been broken by them, or that any breach has occurred ; they deny that they have put it out of their power to fulfil the said agreement, or that the plaintiff has suffered any damage.

6. And, further, they say that the plaintiff's rights under the said agreement are fully protected by the terms of the agreement entered into between the defendant syndicate and the Charterland Gold-fields (Limited), in pursuance whereof the said transfer was effected.

7. The latter company have undertaken the development of the said claims, and have not yet decided upon the abandonment or flotation of the same or any of them, and the plaintiff is not yet entitled to sue in respect of the said agreement.

Wherefore the defendant syndicate pray that the plaintiff's claim may be dismissed with costs.

The replication was general.

The memorandum of association of the Charterland Gold-fields (Limited), which was put in, stated that the objects for which the company was established were *inter alia* (*a*) ". . . . particularly to enter into and carry into effect, with or without modification, the following agreements in the term of the drafts, copies whereof have, for the purpose of identification, been subscribed by William Holmes, a solicitor of the Supreme Court, that is to say : (1) An agreement with the Torva Exploring Syndicate (Limited) ; and (2) an agreement with Les Fils Oulman & Co. (*b*) To prospect for, open, work, explore, develop and maintain diamond, gold, silver, copper, coal, iron, and other mines, mineral and other rights, properties and works, and to carry on and conduct the business of raising, crushing, washing, smelting-reducing, and amalgamating ores, metals, and minerals, and to render the same, merchantable and fit for use."

The memorandum of agreement made between the Torva Exploring Syndicate (Limited), the vendor, and the Charterland Gold-fields, on March 13, 1895, contained the following :

"Whereas the company has been formed for the purposes (amongst others) of acquiring the rights and interests of the vendor company in the territory of the British South Africa Company, and of entering into this agreement in respect thereof, and also of acquiring certain concessions, land, and shares from Messieurs Les Fils Oulman & Co., and entering into an agreement of even date herewith in respect thereof. And whereas it is intended that this agreement and the said agreement with Messieurs Les Fils Oulman shall be completed contemporaneously.

Now it is hereby agreed as follows :

1. The vendor company shall sell, and the company shall purchase, the land, mining claims and interest specified in the schedule hereto, and all and singular other (if any) the properties, assets, and effects of any kind of the vendor company in the said territory except the Stand No. 174, in Bulawayo, in the said territory, and all rights, options,

shares, or other interests in, over, or affecting any property, assets, and effects in the said territory, subject as in the said schedule mentioned, and to the payment of the rents, licences, dues, and royalties, and other rights reserved by the local laws and mining regulations of the British South Africa Company, but otherwise free from incumbrances.

2. The consideration for the said sale shall be the sum of fifty thousand pounds, to be paid and satisfied by the allotment to the vendor company or its nominees or nominee of fifty thousand fully paid shares in the company of one pound each, numbered 135,008 to 185,007 inclusive, and as a further part of the consideration the company shall adopt, perform, and fulfil all the contracts and obligations of the vendor company in the said schedule mentioned, and shall at all times keep the vendor company indemnified against such contracts and obligations, and all actions, proceedings, costs, damages, claims, and demands in respect thereof."

The schedule (No. 2) of mining claims and interests therein annexed to this agreement had the following note attached: "These claims are sold subject to the rights under the contract of the prospectors to be paid on flotation sums of from £200 to £250 for every block of ten claims." The schedule of mining claims acquired since October 3, 1894, had the following note attached:

"Note.—All and singular other (if any) the properties, assets and effects of any kind of the vendor company in the said territory, and all rights, options, shares or other interests of the vendor company in, over, or affecting any property, assets, and effects in the said territory are sold subject to all contracts and obligations of the vendor company affecting the same."

At the trials it was contended for the plaintiffs that any disposal of the claims by the defendants constituted flotation. For the defence, Mr. Holland, the manager of the Charterland Company, said flotation meant inviting subscriptions from the public for the purpose of launching a company, and that the flotation was complete when the public had responded and the capital was provided. Dr. Hans Sauer in his evidence said that flotation of claims in this country was the flotation of claims to work at a profit into a company ordinarily called a gold-mining company. A gold-mining company was one which was formed to work at a profit; a mere transfer of claims was not necessarily a flotation. Mr. Heyman, managing director of Willoughby's Consolidated said: "Flotation of claims is the grouping of a certain number of claims to be formed in a gold-mining company to be worked at a profit, the mere disposal of claims is not a flotation, the pooling or amalgamation of various interests is not a flotation."

It was admitted by the parties that the claims involved in the suit were included in the schedules annexed.

Judgment was given for the plaintiffs, with costs in all three cases.

The defendant company appealed.

The judgment of Vintcent, J., in the High Court, in Kelly's case was as follows:

In July, 1894, when the Mining Regulations, No. 1, 1890, were in force, the parties to this suit entered into the agreement annexed to plaintiff's declaration, the terms of which are to the effect that the plaintiff undertook to give his exclusive services as prospector to the defendant syndicate for a certain period, during which he bound himself to locate mining claims for and on behalf of the syndicate, the syndicate having the right to abandon or develop any claims so pegged. In consideration of such services the plaintiff was to receive a monthly salary of £15 and to be fitted out by the syndicate with rations and prospecting requisites. In the event of flotation by the syndicate of any claims so pegged by the plaintiff, the plaintiff was entitled to receive in respect of every block of ten claims so floated the sum of £250. The syndicate supplied the plaintiff with a number of prospecting licences by virtue of which he pegged 330 claims, which were duly registered in the name of the syndicate.

In February, 1895, the Charterland Goldfields was incorporated in England with limited liability. Its memorandum and articles of association contain a clause (No. 3) upon which great stress has been laid by the plaintiff's counsel in the course of examination of the various witnesses and of his argument.

An agreement referred to in the above memorandum and articles of association shows that the Charterland Gold-fields has acquired from the Torva Syndicate assets, amongst which were included the 330 claims pegged by plaintiff in accordance with his agreement with the syndicate. This memorandum sets forth that the company was being formed *inter alia* to acquire these claims. The consideration to be paid to the Torva Syndicate, in respect of the acquisition of the assets mentioned in this agreement, was 50,000 fully paid-up £1 shares in the acquiring company; and the Charterland Gold-fields adopted all the contracts and obligations of the vendor syndicate.

It is stated in this agreement that the claims were sold to the Charterland Gold-fields subject to the right of the prospectors upon flotation.

The plaintiff claims £8,250, alleging that under the circumstances above detailed there has been a flotation in terms of his agreement with the defendant syndicate, and in the event of the Court holding otherwise, he demands the sum of £8 250 by way of damages for breach of contract, on the ground that the syndicate has not, as it was bound to, floated within a reasonable time, and that it has by the disposal of the claims to the Charterland Golds-fields put it out of its power to carry out the terms of the agreement with him.

The defence raised is to the effect that flotation has not occurred and that the claims as a fact were pegged on licences the property of the syndicate.

In reply the syndicate contends that no unreasonable time for flotation has expired, that there was no legal obligation upon it to float, it having the power to abandon or develop the claims at will, and further, that the rights of the plaintiff are fully protected by the agreement between the syndicate and the Charterland Gold-fields.

Now with regard to that portion of the plea which avers that the rights of the plaintiff are safeguarded by the agreement between the syndicate and the Charterland Gold-fields, I feel that little need be said, for it seems clear to me that a person cannot cede an obligation, and that where a contract consists of obligations and rights, a person can transfer his rights, but he cannot free himself from his obligations.

In these circumstances I have to decide what is the meaning of "flotation of claims" either *per se* or as understood by the parties to the agreement, or, in the absence of satisfactory evidence as to such understanding, what by the assistance of the laws in force at the time when the agreement was entered into, or of the expert evidence given, may be regarded as its meaning. Counsel for the plaintiff has urged that the term "*flotation*" in respect of claims naturally suggests the launching of a company, formed for the purpose *inter alia* of acquiring the claims, and that acquisition constitutes flotation of the claims. Mr. Holland, the manager of the Charterland Gold-fields, has stated that this definition, even if correct, is not applicable to the circumstances under which his company was brought into existence: he has informed the Court that in the case of the Charterland Gold-fields, the general public were not invited to subscribe towards the raising of the required capital, it having been raised by a few privileged individuals: in short, as he describes it, the company was formed by means of a "pool," the outside public being allowed to purchase shares later on, and that in the open market. I am unable to accede to Mr. Holland's views on this point. Whether a company is formed by a "pool," as described by this witness, or by means of subscription from the public after advertisement, it does not seem to me to make any difference, for in either case the launching of such a concern may fairly be termed flotation.

I am of opinion then that the term flotation with regard to mining claims may, speaking broadly and generally, be taken to mean the selling to the public, whether by means of a "pool" or otherwise, of such claims, the vendor to receive scrip or cash.

In this case it is clear that one of the objects for which the Charterland Gold-fields was formed was the acquisition of the claims pegged by Kelly, and that the absolute *dominium* in these claims has in pursuance of the agreement referred to in the memorandum of association of the Charterland Gold-fields become vested in that company, the Torva Syndicate having received the consideration stipulated for. In these circumstances if the definition I have given be applied, I consider there has been a flotation of the claims pegged by Kelly. The plaintiff is the only witness who has given evidence as to what was understood by himself and the representative of the Torva Syndicate with regard to the agreement. He has stated that Mr. Cresswell, who entered into this agreement with him on behalf of the syndicate, informed him that upon the disposal of the claims either to a company or to an individual his rights would mature. I am inclined to think that the plaintiff may be mistaken in some respects with regard to this conversation, for it appears to me that the acquisition by a company was more likely to have been meant. The plaintiff alleges that he on several occasions interviewed a Mr. Vaile, Mr. Cresswell's successor, with regard to his rights under the agreement, and having learnt that the Charterland Gold-fields were in some way interested in the claims he inquired of Mr. Vaile how matters stood. According to plaintiff's version, Vaile informed him that the Charterland Gold-fields had not out-and-out acquired these claims, but had merely been granted an option on them, and on their exercising this option, *i.e.*, purchasing, he (Kelly) would be entitled to payment from the syndicate on terms of his agreement with it. This statement appears to have been repeated to Kelly on subsequent occasions, and Kelly seems to have accepted it as correct. There has been no contradiction of Kelly's evidence on this point, and I have no reason to come to the conclusion that this witness is to be disbelieved. This fact to my mind affords a fair test as to what was understood by Vaile, who was a witness to the agreement.

With regard to Kelly's position, namely, his right to obtain and claim payment on the acquisition by the Charterland Gold-fields of the claims, Mr. Holland has stated that he at an interview with plaintiff in August, 1896, informed him that flotation could not arise until the claims were being worked to a profit, *i.e.*, until the productive stage had been reached, and that Kelly appeared to acquiesce to this view. It is evident that Mr. Holland's view of flotation is based on the provisions of sections 53 and 54 of the present Mining Ordinance. Defendant's counsel relied strongly upon this alleged acquiescence and urged that plaintiff was estopped thereby from taking up his present attitude. This acquiescence, if any, was expressed to the manager of the Charterland Gold-fields, and it is hardly necessary to state that the latter company is not party to the suit. I am therefore of opinion that the argument of defendants' counsel does not apply to the present case. The Torva Syndicate has in no way been prejudiced by any such acquiescence if it did occur, and no action had been taken by them by virtue of any such acquiescence which can in any way be said to alter their position with respect to their agreement with Kelly. Kelly, I am satisfied, at the time of this interview was not cognisant of the true state of affairs as between the syndicate and the Charterland Gold-fields, and this view appears to me to be corroborated by Kelly's subsequent conduct, and by his earnest endeavours to obtain a copy of the contract between the syndicate and the company. It was only after repeated failures and opposition that he procured such copy, and then for the first time learnt what had actually occurred between the company and the syndicate with respect to the claims. I am of an opinion that Kelly has satisfactorily accounted for his delay in bringing his action, and I am inclined to the view that it was understood by Vaile and Kelly that upon transfer of the ownership of the claims to the Chartered Gold-fields Kelly was entitled to receive his dues.

It has been urged that assuming Kelly's evidence to be unsatisfactory in interpreting the word flotation, regard must be had to the meaning attached to it by local mining men. Messrs. Holland, Heyman, and Dr. Sauer, witnesses for the defence, have broadly laid it down, though Dr. Sauer's views were modified on his attention being drawn to the provisions of section 28 of the Mining Regulations, No. 1, 1890, that it must be taken to mean either the acquisition of claims by a company especially formed with the consent of the Chartered Company to work to a profit or the working to a profit by the original acquiring company with the consent of the Chartered Company. Such a company these witnesses call "a Gold-mining Company" and they express their opinion that, even though a company that has acquired claims has power in accordance with its memorandum of association to work them to a profit, it is not a gold-mining company until it actually takes advantage of its powers in that direction. These witnesses allege that at present mining companies in Rhodesia are in practice mere developing and not gold-mining companies, the productive stage not yet having been reached.

It is undisputed that the Charterland Gold-fields has not yet worked its claims to a profit; it has hitherto merely developed claims with a view ultimately of mining to a profit. It is therefore urged there has been no flotation as locally understood.

I am not prepared to accept this view as applicable to the present case, for it is clear to my mind that it is derived from the provisions of the present Mining Law, which was not in force at the time the agreement between the litigants was entered into.

If consideration must be given to the law in force in 1894, section 28 of the Mining Regulations, No. 1, 1890, may perhaps be of some assistance to arrive at a conclusion. This section appeared to contemplate, after the performance of a certain amount of work on claims, the formation of a company for the purpose of "further testing' the mine. Dr. Sauer has expressed his opinion that "further testing" means both developing and mining to a profit—and that by the light of this section the Charterland Gold-fields could be regarded both as a developing and gold-mining company, and that the Chartered Company could, had it so desired, have demanded its proportion of shares in respect of the acquisition by the Charterland Gold-fields of the claims pegged by Kelly. As a fact the company has not demanded its proportion of such shares, nor has it claimed licence moneys in respect to such claims. Dr. Sauer, who appears to have had a fairly wide experience in dealings with prospectors, and in the formation of Rhodesian companies, has informed the Court that in the earlier days of the settlement, when the Mining Regulations, No. 1, 1890, were in force, he had entered into several agreements with prospectors similar to the one now under discussion, and that on the acquisition of claims pegged by such prospectors for him, by companies with powers and objects similar to those in the case of the Charterland Gold-fields, he had settled with his prospectors, presumably on the ground that in his opinion flotation had taken place. This opinion of course is not conclusive, but it appears to me to be of some service in deciding as to what was understood by the term flotation with regard to mining claims, by at any rate one who has been produced by the defence as a witness possessing a wide local experience.

In conclusion, from whatever point of view this question is to be regarded, the result in my opinion must be the same. Whether the meaning of the term flotation, as ordinarily understood or as understood by the parties to this suit, or as may be as having been understood by the light of the laws in force at the time the agreement was entered into, be applied, flotation has in my opinion taken place, and there must therefore be judgment for the plaintiff for the amount claimed with costs.

Mr. Innes, Q.C., and Mr. Schreiner, Q.C., appeared for the appellants.

Mr. Searle, Q.C., and Mr. Russell for the respondent Kelly.

Mr. Russell for the respondents Mocks and Lamb.

The arguments of counsel proceeded upon the record in Kelly's case.

Mr. Innes: "Flotation" is not defined in any of the text books. It is a stock-exchange word. The amount claimed is not to be paid on the flotation of a company but on flotation of each block of ten claims. Whatever flotation means, it means something connected with a company. I submit that it means here the procuring of these claims to be worked by a company according to the law existing at that time. The law at that time drew a distinction between testing for working and flotation. What the defendants did was to transfer the claims to another company to do their testing. In order to prove flotation there must be proof of working for gold by a joint stock company according to law. That law is set forth in the *Mashonaland Mining Regulations*, No. 1, 1890. Section 1: "The right of mining . . . belongs to the British South Africa Company." Section 9: "Every holder of a prospecting licence shall have the right to peg off . . . ten quartz reef claims in block." Section 10: "Every quartz reef claim registered by any prospector is held on joint account in equal shares with the company, and every transfer, hypothecation, or lien of his interest, or portion of his interest in such claims is subject to the right of the company." Section 20: "Every digger shall sink a shaft of a depth of 30 feet." Section 27: "So soon as the claimholder has done the required amount of work, &c., he shall receive from the Mining Commissioner an inspection certificate." Section 28: "When the claimholder shall have received his inspection certificate, he shall request the company to make a proposal for the flotation of his block into either a joint stock company or into a syndicate to further test the mine. The company shall within a reasonable time either make a proposal or decline to do so." Section 29 "Up to the time of flotation the claimholder shall pay no licence. After flotation the licence shall be at the rate of ten shillings per claim per month."

[De Villiers, C.J.: Has the company been requested, under section 28, to make a proposal?]

No. Since 1890 there has been a change in the law. *Notice of 17th May*, 1892, issued by the company is in following terms: "The company waives its present option of flotation of mineral companies as laid down in its mining regulations, but retains the right of veto on any particular flotation and requires application for formal consent before any mineral companies can be floated." This was the law in 1894. *Mines and Mineral Ordinance of* 1895 is the same in spirit and essence as the Regulations of 1890. It divides all work on quartz reef into testing and working for gold. Section 53: "It shall not be lawful for any registered mining location other than an alluvial claim to be worked for profit (except profit the whole whereof is expended in the development of the location) until such time as terms upon which such working for profit shall be permitted shall have been arranged with the British South Africa Company." Sections 22, 23 and 24 deal with Inspection Certificates. The Ordinance does not itself contain the word "flotation" but it appears in the side-note to section 54. In *Wilson and Cinamon* v. *Hirschler* (7 Sheil. p. 289), it was held that there was no flotation. In that case although there was no transfer of the claims there was a transfer of the right to the claims. The principle is the same. The Court below was in error in holding that the doctrine of flotation as dependent upon working is derived from the present law. It is really derived from the law of 1890, which was in force in 1894. Payment can be made by one person on behalf of another and so by the Charterland Company when they work the claims. *Voet* (46, 3, 1): *Pothier on Obligations* (Vol. 1, p. 389).

[De Villiers, C.J.: Is not the syndicate bound to float within a reasonable time?]

No.

[De Villiers, C.J.: What remedy has the plaintiff if the syndicate were to dissolve?]

The syndicate is a joint-stock company, and would have to come to the Conrt to be wound up; but the Court would not allow a winding up with these contracts pending.

Mr. Searle: The formation of a company to deal with these claims at or for a profit is a flotation. The view that actual working is required is negatived by *Wilson and Cinamon* v. *Hirschler*. The only case in which flotation is mentioned is *Emma Silver Mining Company* v. *Lewis* (4 C.P.D., p. 396) (*per* Lindley, J., at p. 407), "starting a company or floating it." See also *Chadwick Healey on Company Law and Practice* (p. 35). *Palmer's Director's and Shareholder's Legal Companion* (p. 95) speaks of starting a company as "floating it." *Imperial Dictionary*: "to float is to raise funds by sale of shares, to set going." In *Grove* v. *Bulawayo Estate Company* (London "Times," 30th March, 1898) the circumstances were similar, and it being left to the jury to say whether the defendant company was a gold-mining company formed to float certain claims they found in the affirmative.

[De Villiers, C.J.: The point is whether the flotation intended must be taken to be flotation in accordance with the law as it then stood.]

That is not pleaded. The words used in the contract are "flotation by the syndicate," and no alienation now can be a flotation by the syndicate. The claims have already been floated by the syndicate to the Charterland Company, who have the benefit of the share-money and shares and cannot keep the plaintiff out of his share indefinitely. In *Hirschler's* case there was nothing in the contract to bind Hirschler himself to float the claims. Here the flotation must be by the syndicate. Again in that case shares were claimed, and it was held that he could not claim Rhodesia Company's shares. In this case money is claimed. Secondly, as to the intention of the parties as to the meaning of the word when the contract was entered into, there is evidence on the point.

[De Villiers, C.J.: Strictly, that evidence is not admissible, except so far as it was the evidence of experts.]

The term is a technical one requiring explanation, and as it is susceptible of two meanings oral evidence is admissible. *Taylor on Evidence* (Vol. 2. p. 761) quoting *Shore* v. *Wilson* (1842, H. L.) Thirdly, as to the meaning of flotation by the light of the law in force, B.S.A. Co.'s Ordinance 4 of 1895 provides that "mining rights within the limits of the Ordinance before the Mines and Minerals Ordinance, 1895, came into force shall be deemed to have been acquired under the Mines and Minerals Ordinance, 1895, and shall be held under and subject to the provisions of that ordinance." There is no evidence that the permission of the B.S.A. Co. was not obtained. *Barber's Gold Law* (pp. 65) and cases there quoted.

Mr. Innes in reply: There is no flotation before an inspection certificate is obtained and the company is licensed. There is nothing in the contract to force the company to float. The claims can be floated block by block, and the intention was that £250 should be paid upon the flotation of each block. *Grove* v. *Bulawayo Estate Company* has not been finally decided, as notice for a new trial has been given.

Mr. Searle: The meaning of the fifth clause of the contract is that the syndicate could abandon the property before flotation: it gave them the option of accepting or not and they accepted.

Postea (May 20th).

De Villiers, C. J., in giving judgment, said: This is an appeal against a judgment of Mr. Justice Vintcent, in the High Court of Matabeleland, awarding to the plaintiff the sum of £8,250 with costs. The claim arose out of a contract made in 1894 between the plaintiff and the defendant company, which may be conveniently termed the syndicate, whereby the former agreed to do certain "prospecting work" for the syndicate on certain terms and conditions, of which the following are the most material: "5. Should the prospector peg off any mining property or properties he shall inform the syndicate's representative thereof, and the development or abandonment of such property or properties shall be at the discretion of the syndicate's representative. 6. All claims pegged off by the prospector shall be transferred to the syndicate. 7. The prospector shall receive from the syndicate the sum of £250 on flotation by the syndicate of every block of ten claims pegged by the prospector." Under this contract the plaintiff proceeded to prospect for gold and succeeded in acquiring 330 claims which he pegged off on behalf of the syndicate. As the syndicate had provided him with the requisite licences there was no necessity for him to make a formal transfer of the claims. In 1895, a company called the Charterland Gold-fields (Limited) was formed in London for the purpose, amongst others, of acquiring the rights and interests of the syndicate in the territory of the British South Africa Company, including the claims already mentioned. An agreement was in due form entered into by which the syndicate sold the mining claims and other rights and interests to the company for the sum of £50,000, to be paid by the allotment to the syndicate of £50,000 fully paid shares in the company. As a further part of the consideration the company undertook to "adopt, perform, and fulfil all the contracts and obligations of the syndicate and to keep the syndicate indemnified against such contracts and obligations." The memorandum of association of the company confers on it the widest powers possible, and mentions among the objects for which the company is established: (*a*) "to purchase or otherwise acquire . . . mines and mineral properties, and also grants . . . claims, licences or authorities of and over mines, mineral properties, mining water or other rights in Africa and to carry into effect the agreement with the syndicate; (*b*) to prospect for, open, work, explore, develop and maintain diamond, gold . . . and other mines, mineral and other rights . . and to carry on and conduct the business of raising, crushing, washing, smelting, reducing, and amalgamating ores, metals and minerals and to render the same merchantable and fit for use." One of the special objects, therefore, for which the company was established was that of gold-mining, but, in fact, the company had not, before the action was brought, extended its operations beyond "development" of claims as distinguished from actual gold-mining. The plaintiff does not appear to have become aware of the exact nature of the agreement between the syndicate and the company until he obtained a copy of the agreement from his lawyers in London. He then instituted the present action, claiming from the syndicate the sum of £8,250 as being due to him on "flotation" of the claims by the syndicate, with an alternative claim for damages for negligence and delay, in case it should be held that there had been no "flotation" by the syndicate. The defendant company, by its plea, denied that there had been any flotation within the meaning of the contract, and stated, moreover, that the plaintiff's rights are fully protected by the terms of the agreement between the syndicate and the company. In regard to this last statement in the plea it is impossible to hold that the obligation of meeting the plaintiff's demand has been transferred from the syndicate to the company. No doubt the latter is bound to indemnify the former against the demand, but the plaintiff's contract was with the syndicate and not with the company. In the absence of any proof of *novatio*, or to speak more precisely *delegatio*, the plaintiff cannot be compelled to forego his claim against his debtor because of such debtor's arrangement with another company. Some attempt has been made to furnish such proof by giving evidence of what is said to be acquiescence on the plaintiff's part in an arrangement by which the company "simply stood in the shoes of the syndicate," but the evidence wholly failed in proving such acquiescence. The plea certainly does not raise the defence of acquiescence, but merely states that the plaintiff's rights are protected by the agreement with the company. This statement obviously furnishes no defence in law. The real question is whether there has been such a flotation of the claims as entitles the plaintiff to the payment of the stipulated sum. The term "flotation" is a technical one and, as applied to companies, is of comparatively recent origin. The defendant called several witnesses to prove the meaning of the term according to the mining and commercial customs of South Africa, but no two of them agreed in their definitions. According to Holland, who is the manager of the company, flotation means "applying to the public to take shares and," he added, "the flotation is complete when the capital is provided. My company did not apply to the public for capital." According to another witness, Heyman, who is managing director of Willoughby's Consolidated," flotation" means "the grouping of a certain number of claims to be formed in a gold-mining company to be worked at a profit." He adds that "the mere disposal of claims is certainly not a flotation, the pooling or amalgamation of various interests is not a flotation." Dr. Sauer, who is the general manager of the Rhodesian Exploration Company, defines flotation as "the flotation of claims to work at a profit into a company ordinarily called a gold-mining company." His test appears to be not what the objects are for which the company has been formed, but what the company actually does. The plaintiff in his evidence stated that before entering into the contract he and Creswell, the then manager of the syndicate, discussed the meaning of "flotation," and the latter said it was understood that if the claims were sold or disposed of to a company or to an individual the plaintiff would be entitled to receive his remuneration. The learned judge thought that there might be a mistake as to acquisition by an individual, and that acquisition by a company only was meant. The plaintiff also stated that Vaile, Creswell's successor as manager, told him that if the company accepted these claims and paid for them he would receive his money. The learned judge believed this statement. The oral statements made by these witnesses were not strictly admissible as evidence to explain the intention of the parties to the contract, but, having been made by persons who at the time of making them were respectively managers of the syndicate, they may be used as admissions made by responsible and competent officials of the syndicate in regard to the meaning of the term "flotation." No objection appears to have been taken to the admissibility of the evidence. The evidence of Holland, one of the defendant's witnesses, contains an admission which, if meant to be unqualified, would be fatal to the defence. "If," he said, "these claims had been transferred to a gold-mining company Kelly would have been entitled to his money." He added that "the company is not a gold-mining company but a development company." The only test of the powers and objects of the company is afforded by the memorandum of association which, as I have said, makes it clear that the company is a gold-mining company as well as a development company. It is only fair, perhaps, that Holland's admission should be read by the light of his previous evidence when he stated that there can be no flotation without applying to the public, but the appellants' counsel has candidly admitted that this view cannot be supported. Quite independently, however, of the evidence given in this case, I am of opinion that there has been a "flotation" of the claims in the sense universally understood in South Africa and that the plaintiff must succeed unless the laws in force in Matabeleland at the date of the contract require that a wholly different construction should be placed in the term. Mr. Innes strongly relied upon the 26th and 27th articles of the Mining Regulations then in force which require that before a claimholder can float his claims into a company he must do a certain amount of development work and receive from the Mining Commissioner an inspection certificate that the required work has been done. He also relied upon the 28th article, as amended in 1892, which requires that application shall be made for the formal consent of the British South Africa Company before any mineral company can be floated. The term "flotation," he contended, must have been employed in the sense indicated by the regulations, and consequently there could be no flotation unless the inspection certificate had been given and the formal consent of the British South Africa Company obtained. It is quite possible that the parties to the contract may have contemplated that before flotation of the claims the requirements of the British South Africa Company would be complied with, but it by no means follows that the parties intended, as between themselves, to use the term in any other sense than the ordinary one. The claims were to be acquired for the syndicate, which upon such acquisition would become the "claimholder." The plaintiff might fairly assume that the syndicate would do the required work and apply for the formal consent of the British South Africa Company before flotation, but he cannot be supposed to have intended that the syndicate should have all the benefits of an ordinary flotation without a corresponding liability to himself. It is no valid answer to the plaintiff's claim to say that the syndicate has omitted to do what it ought to have done before flotation. Under the 5th clause of the contract "the development or abandonment of the claims was to be at the discretion of the syndicate's representative." The claims were not abandoned and the plaintiff could not know that they would not be developed by the syndicate, but the all important fact remains that the syndicate has parted with its whole interest in the claims to a gold-mining company for what appears to have been full consideration. The consideration was the allotment to the syndicate of £50,000 fully paid shares in the company of £1 each. The syndicate thus acquired an interest not only in any profits which the company might make by mining on these claims, but also in all profits which the company might make in other mining operations and in carrying out the many wide objects for which it had been established. The syndicate would share in the latter class of profits even if the company should never do any gold-mining on the particular claims in question. I cannot, therefore, concur in the view that the company must first of all do the full amount of development work and then mining work on these claims before the plaintiff can claim his remuneration. Mr. Innes admitted that if the company should at any time do mining work on these claims, even at a loss, the plaintiff will become entitled to his money, but there is nothing in the contract to justify the view that the meaning of flotation was to depend upon the discretionary acts of any gold-mining company to which the syndicate might transfer the claims. The syndicate having sold and transferred its interest in the claims to a company formed for the special purpose, among others, of gold-mining, is, in my opinion, liable to pay the stipulated sum. The appeal must therefore be dismissed with costs.

Buchanan, J., said: The issue in this case depends upon a very narrow point, namely, the construction to be placed on the section of the contract between the parties, by which is secured to plaintiff the sum of £250 on "flotation" by the defendants of every block of ten claims, pegged out by plaintiff. The defendants had the right, under clause 5 of their agreement, to develop or abandon these claims before flotation. Whether they did anything themselves to develop the claims is not very clear. They certainly did not abandon them, but sold them. If the defendants had given an option only to the Charterland Gold-fields Company, in order that the value of the property should be tested, that might have been a different matter. As I understand the plaintiff's evidence, he would not have considered such an option a flotation, but an out-and-out sale of the claims to a gold-mining company he certainly did consider a flotation; and, judging from the record, that was the opinion also of Mr. Vaile, the former manager of the defendant syndicate, who was a witness to the original contract. I incline to the same view. In my opinion the sale and transfer of these claims outright for a substantial consideration to a company fully authorized by its memorandum of association to work mines and to carry on the business of winning gold, is a flotation of the claims within the meaning of the contract. The second clause of the agreement between the Torva Syndicate and the Charterland Company, and the notes to the schedules of claims sold, whereby the latter company take over the obligations of the Torva Syndicate under the contracts with the plaintiff and the other prospectors, may throw upon the Charterland Company the duty of reimbursing to the defendants any sums they may be called upon to pay; but that is a matter between the defendants and the purchasers from them, and does not affect the plaintiff. I concur, therefore, in holding that the decision of the learned judge in the Court below was correct, and that this appeal must be dismissed, with costs. This decision is in no way inconsistent with the case of *Wilson* v. *Hirschler*. The contract and the facts of that case differ most materially from the present action, and especially so in the important particulars, that in *Wilson's* case there was no sale or transfer of the claims to any intermediary. The claims were transferred directly to a company formed for the express purpose of acquiring and working them. Indeed, so far as it can be applied that case may be taken to support our present decision, as it was not there disputed that there could be a flotation of claims without a previous working of them for profit, which is the test of flotation the appellants seek to have applied in their case.

Maasdorp, J., concurred.

All the appeals dismissed accordingly, with costs.

[Appellants' Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

LEVY AND CO. V. LEOPOLD HESSE.

1898.
May 20th.

Foreign judgment.

Mr. McGregor applied for provisional sentence on a judgment of the Supreme Court of Judicature of the High Court of Justice in England for the sum of £479 7s. 4d., with £5 6s. costs. Counsel stated that defendant at the time of the judgment resided in Manchester, England, but was now said to be residing in the Colony. Personal service had been effected.

De Villiers, C.J.: In the case of *Acutt, Blaine & Co.* v. *Commercial Marine Insurance Company*, the Court refused to give judgment against a defendant on a judgment given in Natal during his absence, but that was a trial case and the point was raised on behalf of the defendant. In this case there has been personal service and no appearance has been entered: provisional judgment will therefore be granted.

RICHARDS AND SONS V. EDGAR H. WATKINS

Mr. Gardiner applied for provisional sentence for £32 4s. 10d. on a promissory note.

Provisional sentence granted.

ILLIQUID ROLL.

PEDERSON AND ANOTHER V. WILLIAM MCKENZIE.

Mr. Close applied, under Rule 329D, for judgment for the sum of £159, being the purchase price of certain landed property purchased by defendant from plaintiff.

Granted.

KEESE V. BAIN.

Mr. Buchanan applied, under Rule 329D, for judgment for £120 15s. 9d., being the balance of an account due plaintiff by defendant for goods sold and delivered between December 31, 1896, and May 31, 1897, with interest.

Granted.

ADMISSION.

Mr. Close applied for the admission of Frank James Weeks as an attorney, notary, and conveyancer of this court.

Granted.

REHABILITATION.

Mr. Gardiner applied for the rehabilitation of Jozua Jacob François le Roux.

Order granted.

GENERAL MOTION.

SHARP V. CITY TRAMWAYS CO., LIMITED.

This was an application by the defendants for a commission *de bene esse* to take the evidence of a witness who was in Matabeleland. Leave was asked to have the evidence taken at Bulawayo, with the understanding that, if it became necessary, it might be taken at Salisbury, the witness being in the Mounted Police. If this were done, notice would be given to the other side.

Mr. Searle, Q.C., appeared for the applicant.

Mr. Buchanan appeared for the respondent, the plaintiff in the action, and consented to the application being granted.

The order was granted, Mr. Tredgold being appointed commissioner.

[Before the Hon. Mr. Justice BUCHANAN and the Hon Mr. Justice MAASDORP.]

REHABILITATIONS.

Mr. Innes, Q.C., asked for a postponement of the application for rehabilitation of James Roberts until the first day of next term.

Postponement granted.

Mr. Gardiner applied for the rehabilitation of Harris Kelman and George Bernstein (lately trading as Kelman & Bernstein).

Order granted.

Mr. Buchanan applied for the rehabilitation of Henry Eedes Moss.

Granted.

GENERAL MOTIONS.

LAWRENCE V. LAWRENCE.

Mr. Gardiner moved that the rule *nisi* calling upon defendant to show cause why the petitioner should not be allowed to sue *in forma pauperis* for divorce, be made absolute. The rule had been personally served.

Order granted, Mr. Gardiner being appointed counsel and Mr. De Korte attorney.

MACELLI V. MACELLI.

This was a similar application made by Mr. Gardiner.

The order was granted, Mr. Gardiner being appointed counsel and Mr. De Korte attorney.

BREDENKAMP V. BREDENKAMP.

This was an application for leave to sue by edictal citation in an action to be instituted by plaintiff against the defendant for restitution of conjugal rights, failing that for divorce, or in case of plaintiff being able to produce evidence of adultery on defendant's part, for a decree of divorce. Mr. Buchanan appeared for the applicant.

Order granted, citation to be returnable July 12; personal service to be effected; leave granted to serve intendit and notice of trial at same time as citation.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

PETITION OF HENRY DOWSETT.

On the motion of Mr. Close, the rule *nisi* granted in this case was made absolute.

PETITION OF ALICE MARY BLEKSLEY.

Mr. Currey applied for a rule *nisi*, calling upon applicant's husband defendant to show cause why she should not sue him *in forma pauperis* for a decree of nullity of marriage.

Granted, and rule made returnable Thursday next.

WELCH V. GLASGOW.

Mr. Maskew applied for leave to sue by edictal citation in an action to be brought by plaintiff against for the payment of certain money, purchase price of certain land at Woodstock, or failing that, for the cancellation of the sale.

Granted, citation returnable July 12; one publication to be made in the "Government Gazette."

VAN RENSBURG V. VAN RENSBURG.

1898.
May 20th.
„ 21st.

This was an action for the recovery of £120, alleged to be due on a promissory note. The pleadings stated that defendant was plaintiff's son-in-law, and borrowed £120 from her on October 2, 1897, for which sum he gave her a promissory note, payable in four months' time. It was alleged by the plaintiff that on December 9, 1897, defendant obtained possession of the note, pretending he was about to pay the amount, and thereupon destroyed the note. It was common cause between the parties that the note had been given, and that defendant destroyed it on December 9, but defendant alleged that he had paid the amount.

Mr. Innes, Q.C.. (with whom was Mr. Gardiner), for the plaintiff.

Mr. Searle, Q.C. (with whom was Mr. Buchanan), for the defendant.

Gertrude Margaretta Janse van Rensburg, the plaintiff, stated that she was a widow, her husband having died on August 11 last year. Witness lived at Vosburg. Defendant was her stepson, and on October 2 last year he came to her and asked for a loan of £100, She referred him to the attorney, Mr. Cillier, who had the administration of the estate, and in the afternoon he returned and said that Cillier had given him £120. On October 4 witness got the promissory note from Cillier, and kept it in her possession till December 9, when defendant came to see her at her house at Vosburg. He asked witness if she had the promissory note at hand, as he wanted to pay it, although it was not due. She brought it, and he took out of his pocket some money rolled in a rag. She let him take the promissory note, which he tore up, afterwards collecting the pieces and putting them in his pocket. He then opened the bundle of money and said: "My wife has deceived me, and has not put £100 in the bundle." Witness said there appeared to her to be about £2 in silver and £18 or £20 in gold in the rag. Witness was angry, and defendant said she must write another promissory note, and he would come again and bring the money. She went and brought paper, but when she commenced to write, defendant walked out into the passage. She told him he was not to go until he signed the note, but he went out, closing the door after him. She had never received payment of the money.

Cross-examined: The cloth containing the money was not opened until defendant had destroyed the promissory note.

Bettie Loots, now living with her parents at Leeuwkop, in the district of Prieska, said that last December she was living with plaintiff, being at school in Vosburg. On December 9 she came from school between nine and ten o'clock sick. She corroborated plaintiff's evidence as to defendant coming to plaintiff's house, and as to what took place between plaintiff and defendant concerning the note. Witness had seen the whole affair from the door leading into the room.

Jacobus Loots also gave corroborative evidence.

Frances Coppen, now residing in Cape Town, but up to April 20 last an assistant teacher in the school at Vosburg, corroborated Bettie Loots' evidence as to her leaving the school sick between nine and ten o'clock on the morning of December 9 last.

Jacomina van Staden, a servant in the employ of plaintiff, gave evidence generally corroborating that of plaintiff and Bettie Loots as to defendant's visit to plaintiff's house on December 9.

Daniel Gysbert Steyn, law agent, said that he was also postmaster at Vosburg. He gave evidence in connection with a registered letter for defendant arriving at the post-office at Vosburg on December 11, which defendant refused to accept.

This closed the plaintiff's case.

For the defence,

Albertus Abraham Janse van Rensburg, the defendant, a farmer residing at Zoutfontein in the district of Victoria West, about two hours from Vosburg, admitted getting the loan of £120 from the plaintiff and giving the promissory note on October 2, 1897. On December 9 he went to Vosburg, taking with him about £125 for the purpose of paying his stepmother, the plaintiff, the money he owed her on the promissory note. There was a man named Lotriet along with witness. The money was all in gold, and was in witness's coat pocket wrapped up in a rag. After transacting some business in the village witness went to the plaintiff's house, Lotriet going with him for a short distance. Witness went into the house and greeted his stepmother. He saw no other person in the house at the time. After some conversation the matter of the promissory note was mentioned, and plaintiff agreed to receive the money then. Witness counted out the money on the table, and plaintiff gave him the promissory note. She gathered the money together on the table, and witness tore up the note.

De Villiers, C.J.: Why did you tear up the note instead of putting it in your pocket?

Witness: It is a custom amongst us farmers.

Examination continued: Witness left in a hurry because his wife was sick. When he went out Lotriet was outside plaintiff's house. Before he went to his mother-in-law's, just after he had left the plaintiff's, he put his hand in his pocket to get some sweets, and the rag in which the money had been wrapped stuck to his fingers. Lotriet saw that and remarked on it. After December 9 witness never went to see his stepmother. He had not a pleasant time there, so he did not visit. One day witness heard there was a registered letter for him at the post-office at Vosburg. He went there; but as the form of receipt was in English, which he could not read, he would not sign it. He asked Mr. Steyn, the postmaster, to translate it, but he said it was more than he could do.

De Villiers, C.J.: Why were you afraid to sign the paper? What did you think?

Witness: I did not form any definite opinion about it, but as I did not understand it I would not sign.

De Villiers, C.J.: You knew there was a registered letter waiting you at the post-office and the postmaster told you that you had only to sign that paper to get the letter. Therefore, you knew there could be no harm, unless the postmaster was a rogue. Were you not curious to know what was in the letter?

Witness said he was curious, and went twice to see Mr. Steyn.

De Villiers, C.J.: And he would not translate to you on either of those occasions? Was that because he could not or would not?

Witness could not say what Steyn's intention was, but he would not translate the form.

Cross-examined: It was his custom to tear up such bills as soon as the money was paid. He recently paid two bills to Mr. Cillie. but he did not tear them up in his office, as he did not want to make the office dirty, but he tore them up as soon as he got out. He swore positively that he paid the money.

The Chief Justice recalled the plaintiff, who swore that she had not received a single penny of it.

Hugo Lotriet, farmer, said he saw the defendant pay some money to the plaintiff.

De Villiers, C.J.: It is not necessary to hear Mr. Innes. I am sorry to say that in my opinion the defendant has made a barefaced attempt at fraud. The conduct of the plaintiff was perfectly straightforward. First of all, when the money was alleged to have been paid, and as soon as the defendant left she sent after him in order to induce him to return and settle the matter, but he never came back. In her conduct to the defendant she has shown that she was well disposed towards him, and it is impossible to conceive that she would all at once turn round and attempt this fraud upon him by attempting to get the money from him when it had just been paid. On the other hand the defendant states that the tearing up of the promissory note was the usual thing for farmers to do, but I have never heard of such a thing being done by farmers. According to the defendant's evidence, the lady had not pocketed the money, but had only scraped it together when he tore up the note, and afterwards when the message was sent to him to ask him to come back to this lady, who had foregone the whole of the interest on the promissory note, he did not return, and from that time he avoided going to see her. But his most extraordinary conduct was in connection with the registered letter. He heard that there was a registered letter waiting for him at the post-office. He was told by the postmaster that it came from Britstown. I am satisfied that the defendant suspected that it was in reference to this promissory note, and thought it best not to receive it. I am perfectly satisfied that the defendant must have known what were the contents of the document, and for this reason avoided signing the receipt form. The defendant tore up the note, because he thought he could carry off a fraud, because he was dealing with a lady and not with a man of business, but fortunately she had recourse to a court of law. The judgment of the Court is for plaintiff with costs.

Buchanan, J.: I fully concur, and endorse every remark made with respect to the defendant's conduct. The defendant may congratulate himself that he is not standing in a criminal dock, instead of being a defendant in a civil action.

[Plaintiff's Attorney, Paul de Villiers; Defendant's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

ACUTT AND CREWE V. LILEY. { 1898. May 23rd.

Principal and agent—Mandate—Authority—Broker—Sale and purchase—Price.

A broker having negotiated the sale of a stand drew a bill upon the purchaser (payable to the Savings Bank) with the consent of the seller's lawful attorney, who gave to the bank the transfer deed in favour of the purchaser, *with instructions to hand over the same to the purchaser upon payment by him of the bill.*

Held, that *whether the broker acted as the agent of the purchaser or of the seller in effecting the sale the conduct of the seller's attorney was a sufficient authority for the payment of the price to the broker.*

Held, further, affirming the judgment of the High Court of Matabeleland, that *the purchaser, after payment of the amount of the bill to the bank and delivery to him of the transfer deed, was not liable to the seller for such portion of the price as the broker failed to pay over.*

This was an appeal from the judgment of Mr. Justice Vintcent in the High Court of Matabeleland, in an action in which the appellants were the plaintiffs, and sued the defendant for £250, being the balance of the purchase price of a certain piece of land. The plaintiffs carried on business at Bulawayo and the defendant resided at Mafeking in the Cape Colony and was sued by edictal citation.

The plaintiffs' intendit stated that in their capacity as brokers for the St. Helen's Development Company they sold to the defendant on July 10, 1897, a certain stand in the township of Gwelo for £800: that this stand was duly transferred to him on August 18, 1897; that on September 13 the defendant paid £550, leaving a balance of £250 owing, which he had yet to pay: that plaintiffs paid £250 to the said company in respect of the balance, and received cession of the company's right of action.

The plea alleged that the defendant had no knowledge that the plaintiffs or the St. Helen's Development Syndicate had any interest in the sale of the stand: that at or about the date alleged the defendant entered into negotiation with a firm of brokers known as Gradwell & Parkin, who acted in the said sale, and did not disclose or make known to the defendant for whom they were acting, and that in July the sale was concluded with Gradwell & Parkin; that subsequently, on the 23rd July, Gradwell & Parkin drew upon defendant through the Standard Bank for £800, and defendant duly met and paid the draft, as also a further sum of £11 13s. 7d. for transfer fees and charges: that he thereupon through the Standard Bank received the title and transfer deed. The plaintiffs, in their replication, denied that Gradwell & Parkin were their agents, or the agents of the St. Helen's Company, for any purpose connected with the sale, and had no power to receive the purchase money.

The evidence showed that the St. Helen's Development Syndicate employed a broker, named Steward, to sell certain stands. Crewe, one of the plaintiffs, obtained a list of the stands from Steward, and he communicated with Gradwell, one of the partners of Gradwell & Parkin, who were acting for Riley. The result was the sale of the stand in question. Riley, the defendant, said he saw a notice at Gradwell's office about the sale of stands and inquired about them: that he did not know who was the owner of the stands, and looked upon Gradwell as the agent of the seller. Gradwell deposed that he told Crewe for whom he was acting, but did not think he did so before the sale was closed. He also said that Riley did not know who the owner of the property was, but knew he (Gradwell) was not the owner.

After the sale was closed the plaintiff handed the title deeds to Lester & Hopley, his attorneys, to effect transfer in favour of Riley, with instructions to receive the purchase price. Declarations of seller and purchaser were signed by Gradwell & Crewe respectively, as agent of purchaser and seller. Transfer was duly passed to Riley, and Gradwell was told of this. Gradwell was told by one Campbell, clerk to Lester & Hopley, that he could get all the deeds on payment of the purchase price, and that Campbell would draw on Riley. Campbell then learnt that Gradwell had already drawn on Riley through the Standard Bank for the amount. When Gradwell's draft was presented to Riley by the bank at Mafeking, where he resided, he refused to accept it unless the transfer deed and other documents were delivered to him through the bank contemporaneously with the payment. This condition was communicated to the bank, to Gradwell, and to Lester & Hopley, whereupon Campbell, on his employers' instructions, handed the transfer deed to the bank, with directions to deliver it to Riley on payment of Gradwell's draft, and a further draft on

Riley by Lester & Hopley for £41 13s. 7d., costs incidental to the transfer. On this latter draft was the following endorsement by Campbell: "Title deeds of stand 249. to be handed over on payment of foregoing amount." The deeds and draft were delivered to Riley by the Mafeking branch of the bank upon payment of the two drafts The bank at Bulawayo then paid Lester & Hopley the amount of their draft, but as Gradwell had overdrawn his account with them, debited such account with the amount of the overdraft, the result being that Gradwell only obtained £550, which was paid to the plaintiffs' attorneys.

The plaintiffs then obtained cession of action from the St. Helen's Syndicate, and sued the defendant for the balance.

Judgment was given for the defendant with costs.

The plaintiffs appealed.

The following reasons were sent down by Mr. Justice Vintcent:

In this action plaintiffs, who are brothers, carrying on business at Bulawayo, sue the defendant, a trader residing at Mochudi, in the Bechuanaland Protectorate, for the sum of £250, alleged to be due as the balance of the purchase price of a certain stand sold to the defendant in July last. The admitted and proved facts of this case are as follows:

The St. Helen's Development Syndicate, owners of Stand No. 249, in the township of Gwelo, had authorised a broker named Steward to dispose of this stand. Plaintiffs, as well as Gradwell. were aware of the fact that this particular stand was in the market. Gradwell had acquired this information either directly from plaintiffs or from a perusal of an advertisement posted up at plaintiff's offices. It appears that there is a practice amongst brokers in Bulawayo to exchange lists of stands which they are authorised by the owners to sell. and in the event of a sale being effected through the instrumentality to whom such list has been furnished to divide commission with the broker or brokers from whom such lists have been received. Gradwell had posted outside his office a notice stating that certain stands, including No. 249, were for sale. The defendant during the course of a visit to Bulawayo observed this notice, and informed Gradwell that he wished to purchase Stand No. 249. Gradwell stated that the price was £825. The defendant made an offer of £750, whereupon Gradwell informed him that he would have to see his people regarding the matter. Neither at this time nor at any time thereafter until upon receipt of the transfer-deed was defendant aware who were the owners of this stand, nor did Gradwell until some time after sale know for whom plaintiffs were acting in the matter.

Negotiations between Crewe and Gradwell proceeded, the results of which were communicated to the defendant by Gradwell.

Eventually defendant expressed to Gradwell his determination to give no more than £800 for this stand. Defendant thereupon returned to Mochudi, and shortly after his departure Crewe, one of the plaintiffs, accepted the offer, and this fact came to the knowledge of the defendant some time afterwards through Parkin, Gradwell's partner. After acceptance of this offer Crewe learnt from Gradwell that defendant was the purchaser, and, on asking Gradwell how the purchase price was to be paid, was informed that he (Gradwell) would draw on defendant. This arrangement appears to have met with Crewe's approval, and according to Crewe's evidence is in accordance with the custom of local brokers. The actual purchase price demanded by Steward, St. Helen's broker, was £750. Brokerage charges to be paid by purchaser. Crewe shortly after the sale was concluded paid Steward the purchase price and £16 13s. 4d., his share of the commission to be paid in respect of the sale, the balance of this commission being equally divided between Crewe and Gradwell. Broker's notes were duly passed between Steward, Crewe, and Gradwell, plaintiffs appearing on the notes passed between them and Steward as the purchasers. The title deeds and a power of attorney to pass transfer were delivered by the syndicate to Crewe, and by him handed to his solicitors, Messrs. Lester & Hopley, with instructions to effect transfer in favour of Riley and to receive the purchase price. Declarations of seller and purchaser were signed by Gradwell and Crewe respectively, as agent of purchaser and seller. The purchase price was declared to be £800, and transfer duty was paid on that amount. Transfer was duly effected in defendant's favour.

Thereafter, one Campbell, a clerk in the employ of Messrs. Lester & Hopley, informed Gradwell that the transfer was in order, and, as instructed, demanded payment of the purchase price. He then learnt that Gradwell had already drawn on Riley through the Standard Bank for the amount.

It appears that Riley, on this draft being presented to him by the Mafeking branch of the bank, refused to accept it unless the transfer deed and the other documents were delivered to him through the bank contemporaneously with the payment. This condition was communicated to the bank, to Gradwell, and to plaintiffs' solicitors, whereupon Campbell, acting on the instructions of his employers, handed the transfer deed to the bank, with directions to deliver it to Riley on payment of Gradwell's draft and a further draft on Riley by the solicitors for the sum of £41 13s. 7d., the amount of costs incidental to the transfer. On this latter draft is an indorsement by Campbell, which, in my opinion, has an important bearing on the case. It is as follows :—

"Title deeds of Stand 249 to be handed over on payment of foregoing amount."

The bank duly forwarded the deeds and draft of Messrs. Lester & Hopley to their Mafeking branch, who, upon payment to them of the two drafts, delivered the documents to Riley. The bank at Bulawayo, on being informed by its Mafeking branch of the above payments, paid Messrs. Lester & Hopley the amount of their draft, but, as Gradwell's firm had overdrawn his account with them, debited such account with the amount of the overdraft, result being that Gradwell only received £550, which was paid to plaintiffs' solicitors in respect of the sale of the stand.

In these circumstances plaintiffs', who subsequent to the payment to them by Gradwell obtained cession of action from the St. Helen's Syndicate, sued defendant for the balance, namely, £250.

It was contended by plaintiffs' counsel that Gradwell did not act as agent for the vendors, but must be regarded as agent for defendant, and that, as payment was made to Gradwell in such capacity, plaintiffs were legally entitled to sue defendant for the unpaid balance inclusive, credit not having been given to Gradwell, it being known to Crewe that Gradwell acted for a principal whose name was disclosed immediately after the sale was concluded.

Counsel referred to the cases of *Irvine* v. *Watson* (L.R., 5 Q.B.D., pp. 102 and 414), and *Davidson* v. *Doneldson* (L.R., 9 Q.B.D., p. 623), and to *Anson on Contracts* (5th Edition, p. 358).

Counsel further urged that, even if Gradwell acted as the vendors' agent, payment to him could not, in the absence of evidence that he was authorised to receive the same, be regarded as a discharge of the debt, it being evident from the case of *Tank* v. *Jacobs* (1 Juta, p. 289), that a power to sell does not, as a general principle, confer on an agent the power to receive the purchase money.

Mr. Shippard argued that the manner in which the money was paid to the bank did not take this case out of the general rule.

It is clear from the authorities quoted that payment to the agent of the seller cannot, in the absence of circumstances implying an authority to receive payment, be regarded as payment to the principal. Where an agent in effecting a contract does not disclose the existence of a principal, the seller cannot have recourse on such principal if in the meanwhile the principal has *bona fide* paid the agent; but where an agent discloses that he has a principal, but does not give his name, the seller may have recourse to the principal, though he has *bona fide* paid his agent for the goods, unless there has been such conduct on the seller's part, *e.g.*, delay in applying to the principal, as might justify the principal to believe that the seller was not looking to his credit but to that of the agent.

Now, in view of the facts of the case in connection with the transaction with the bank, it appears to me to be immaterial for me to decide whether Gradwell at the time of the sale acted for the vendor or for the defendant. I consider that the proceedings in the matter subsequent to the sale take this case out of the general principles relied on by the plaintiffs' counsel.

The fact that plaintiffs' solicitors were aware of Riley's refusal to honour Gradwell's draft unless the deeds were delivered to him contemporaneously with the payment thereof, and the fact of their agreeing to his terms and instructing the bank to act in accordance with defendant's conditions, satisfy me that they accepted this mode of payment. Messrs. Lester & Hopley must be regarded as having consented either to the bank being their agents for the receipt of the money or to Gradwell as the recipient of it on their client's behalf.

The conduct of the parties leads me to come to the conclusion that Riley was induced to think that payment under the conditions indicated by him would be regarded as an absolute discharge of his liability. His contention that the delivery of the title deeds to him was the best form of receipt he could produce, is, under the circumstances of the case, in my opinion sound. For these reasons I consider that judgment must be entered for the defendant with costs, and, as defendant was a material witness, such costs will include his necessary expenses.

Mr. Innes, Q.C. (with him Mr. Close), for the appellants: Gradwell was Riley's agent. No one else employed him.

[De Villiers, C. J.: As there was only one sale the three brokers were in partnership, and therefore they were all agents of both parties.]

That may be for the purpose of signing the broker's notes only, but for other purposes Gradwell was only employed by Riley. His position was different to that of the other brokers. But even if he was the agent of Acutt or of the St. Helen's Company he was not authorised to receive payment. An agent for sale not specially authorised has no power to receive the purchase price unless certain circumstances exist. *Tank* v. *Jacobs* (J. 1, p. 289); *Anson on Contracts* (7th edition, p. 353); as to payment by principal to agent where the principal is undisclosed, *Irvine* v. *Watson* (5 Q.B.D., p. 102).

[De Villiers, C.J.: This is not a case of a sale to an undisclosed principal. Crewe says he knew that Gradwell was acting for Riley.]

That was only after the sale. Our law considers what was the state of mind of the debtor, not of the creditor. The case was decided on what took place after the sale.

[De Villiers, C.J.: If it is admitted that Campbell was the appellant's agent, I do not see what case the appellant has.]

Campbell did not communicate with the appellant. The point is, who is to suffer for the action of the bank, and the person who put the bank in motion was Riley.

[De Villiers, C.J.: Surely, there was a representation by Campbell to the respondent that if he paid the two bills the appellants would be satisfied with that as payment of the purchase price.]

No, because these were bills of Lester and Hopley in their private capacity. Gradwell was only authorised to receive cash. Riley could not set off any debt Gradwell owed to him. The bank was clearly Riley's agent and therefore could not set off what Gradwell owed them. The bank could not do what its principal could not do.

Mr. Schreiner, Q.C. (with him Mr. Russell), for the respondent was not called upon.

De Villiers, C.J.: In the view which I take of the case it is immaterial whether Gradwell acted as the agent of the seller or of the purchaser in negotiating the sale of the stand. If it were necessary to decide the point, I should be inclined to hold that Gradwell acted for both in signing the broker's note, and that there is not sufficient proof that he was authorised to do more than that on behalf of the purchaser. But the question is whether the defendant, before paying the bill at the bank, had been led by the plaintiff to believe that such payment would be accepted in full satisfaction of the purchase price. The plaintiff did not say that in so many words, but the conduct of the plaintiffs' duly authorised agent fully justified the defendant in the belief that payment of the bill drawn upon him by Gradwell in favour of the bank would be accepted as payment of the price of the stand. The appellant's counsel has candidly admitted that Campbell, the clerk to the plaintiffs' attorneys, was the lawful agent of the seller, and that his acts within the scope of his authority are binding upon the plaintiffs. With full knowledge that Gradwell had drawn in his own name for £500 upon the defendant, Campbell authorised the bank at Mafeking, to whom the bill had been indorsed, to deliver the title deeds to the defendant. Campbell knew at the time that the defendant would not honour the bill unless he obtained the title deeds, and it was in order to induce the defendant to pay the bill that the bank was authorised to deliver the title deeds to the defendant. That an authority may be implied from or a representation made by the conduct of a person has been recognised in frequent decisions of this Court, and notably in *Union Bank* v. *Beit* (9 Juta, 124). Not only did Campbell adopt the act of Gradwell but he himself drew another bill upon the defendant for the attorneys' costs for effecting the transfer of the stand, and on this bill there was an indorsement to the effect that the title deeds were to be handed over on payment of the amount of this bill. The defendant having been told in effect that payment of the two bills would be sufficient to entitle him to the title deeds and having thus obtained transfer of the stand cannot, in my opinion, be called upon to pay again any portion of the purchase price. I desire to express no opinion as to whether the bank was justified in detaining a portion of the amount paid in by the defendant as a set-off against Gradwell's overdraft. That is a question between the plaintiffs and the bank with which the defendant has no concern. The appeal must be dismissed with costs.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné: Respondent's Attorneys, Messrs. Findlay & Tait.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice Maasdorp.]

FAURE V. FAURE.

1898. May 25th.

This was an action for divorce brought by Mrs. Salamina Faure against her husband, Abraham Faure, on the ground of his adultery.

Mr. Close appeared for the plaintiff.

The respondent was in default.

Mr. R. D. Barry, of the Colonial Office, produced a certified copy of the marriage certificate, signed by the parties on the 11th March, 1887, at Hanover.

Mrs. Faure said her husband was formerly a clerk in the Civil Service. She and her husband had resided in different places in the Colony, and finally they went to Victoria West. He was magistrate's clerk at that place. He had been very good to her all the time they were married, and they had had a happy married life. They went to Victoria West about 1894, and things went pretty well until she heard certain things about him. Certain charges of disgraceful conduct were made against him, and he had to leave the Civil Service. She asked him why he had had to resign his position, but he refused to tell her. She afterwards went to an attorney, who told her the reasons. She then charged her husband with what she had found out, and he confessed that he had misconducted himself with servant girls. After that she left Victoria West and went to live with her mother. There were no children of the marriage, and there was no property.

Charles Green, turnkey at Victoria West Gaol, said he knew Mr. Faure very well. He knew a place called the Back-walk, which was overlooked by the schoolroom. He had seen Mr. Faure there, both alone and with coloured girls. In January, 1896, he was a convict-guard, and on one occasion he followed Mr. Faure up this walk because he was inquisitive, as he had often seen him with girls. On that occasion he was a witness to the defendant's misconduct.

It was quite dark when this took place, but he knew it was Mr. Faure, as he recognised his voice and his walk. Faure spoke to his little dog. Afterwards he followed Faure up to the hotel, where he saw him in the light.

Betty Steenkamp, a coloured servant girl, admitted having committed adultery with Faure on one occasion.

A decree of divorce was granted.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

HEIDELBERG MUNICIPALITY V. UYS.

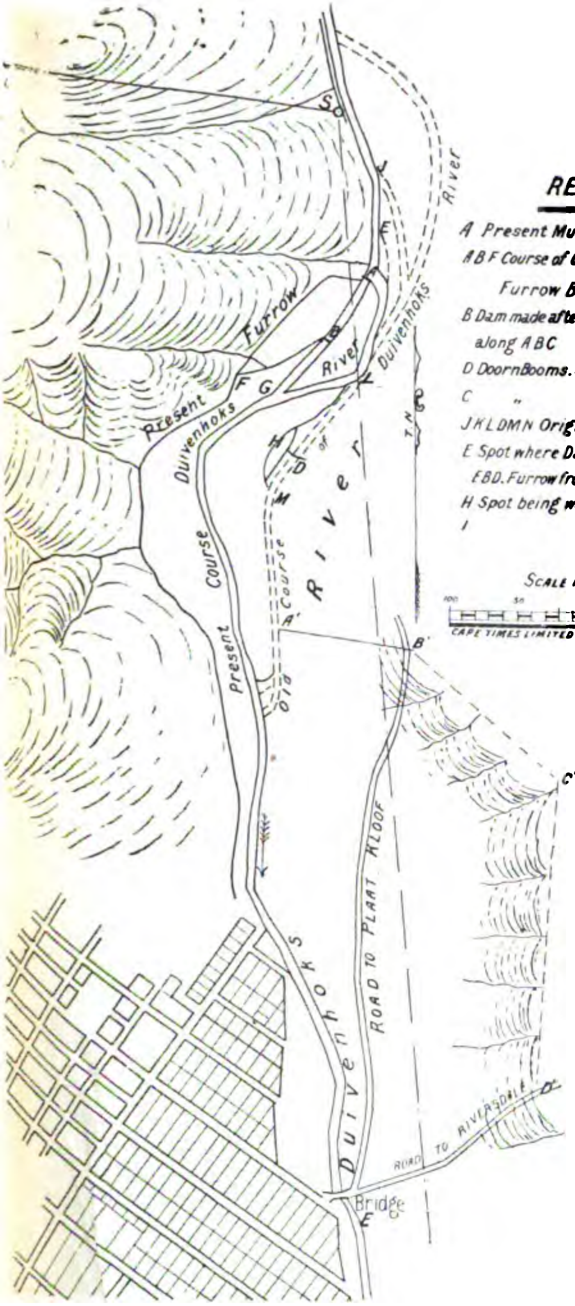
1898. May 25th. " 26th. " 27th.

Servitude—Pasturage Registration—Respective rights of owners of dominant and servient tenements—Grazing cattle and sheep—Municipal regulations.

The owner of a farm having sold certain lots or erven for a village and at the same time granted to the erfholders the right to graze their cattle on certain defined pasture land "without any hindrance of any kind,"

Held, in an action brought by the Commissioners of the Municipality of the village against the grantor's successor in title:

(1) That the defendant, having bought with full knowledge of the servitude, was bound to allow its registration against his title; (2) That he was not entitled to depasture more of his own cattle than would leave sufficient pasturage for a reasonable number of cattle of the erfholders, and (3) That to such reasonable number cannot be added cattle belonging to others than erfholders notwithstanding the existence of a Municipal regulation authorising the issue of grazing licences to strangers.



REFERENCE.

A Present Municipal Dam
ABF Course of Original Furrow from A
Furrow B F still visible
B Dam made after River commenced to flow along A B C
D DoornBooms. Original Dam
C " Present Dam
J K L D M N Original Course of Main Stream
E Spot where Dam A overflows, a new forming
EBD. Furrow from C joins old furrow at D.
H Spot being washed away, making new run L H M

Scale 100 Cape Roods = 1 English Inch

CAPE TIMES LIMITED

The above is a plan of part of the property transferred to the Church Wardens of the Dutch Reformed Church at Heidelberg on the 7th day of April 1858 now vested in the Municipality of Heidelberg; and a portion of the Remainder of Farm Doorn Boom over which the Municipality claim grazing rights

The portion marked A'B'C'D'E' shows the land to the East of the Old Course of the Divenkoks River over which grazing rights are claimed, and the portion between the Old and the Present Courses of the Duivenhoks River is the land in dispute called "Binne Vley."

This was an action for a declaration of rights.

The declaration was in the following terms:

1. The plaintiffs are the Commissioners of the Municipality of Heidelberg, which has been duly constituted under the provisions of Ordinance No. 9 of 1836, and they are the proper persons to sue in this action. The defendant is a farmer residing at and owning a farm called Doornboom, adjoining the said Municipality and situated in the district of Riversdale.

2. In or about the year 1855 one Louis Johannes Fourie was owner of the original farm Doornboom, which at that time comprised the present farm, now the property of the plaintiffs, and also certain land since cut off from the said original farm, and now falling within the Municipal area of Heidelberg.

3. The said Fourie was at the said date desirous of establishing a village upon a certain portion of his said farm, and on the 14th September, 1855, he entered into an agreement with one Evert Philip Kleynhans and fourteen other persons, whose names it is not necessary to set out, but who were all interested in the establishment of a village as aforesaid.

4. In terms of the said agreement, the said Fourie undertook within twelve months from the date thereof, and in consideration of certain guarantees then and there given to him by the said Kleynhans and his co-signatories, to cause to be sold in erven that portion of his farm which was situated upon the Swellendam side of the Duivenhoks River, with the intention of there establishing a village and church, it being further agreed that so much of the said portion as was not disposed of as erven should be transferred thereafter by the said Fourie to the churchwardens of the church so to be founded.

5. The 5th clause of the said agreement was as follows: "I, the undersigned Louis Johannes Fourie, of Doornboom, declare further with respect to that portion of my place which I have kept out for myself, that all owners of erven in the intended village shall have the right in perpetuity to graze their cattle also on the other side of the Duivenhoks River where my before-described property is situated, and that this right of grazing shall remain to them without any hindrance of any kind but only within the following limits, namely, from the lower drift of the public road to the first ridge on the upper side of the thorns, and so running along the top of the ridge to the land where the koenie bush stands and from thence in a straight line to the run of the water, which right of grazing shall after the sale be inserted in the transfer of the portion of ground kept out by me as a servitude for the benefit of owners of erven."

6. Thereafter, in pursuance of the said agreement, the said Fourie did cause a large number of erven to be laid out and sold on the Swellendam side of the Duivenhoks River. The conditions of sale of the said erven were dated in the month of December, 1855, and the seventh of the said conditions provided *inter alia* that the purchasers of the said erven should in respect of the keeping of large and small stock upon the pasturage of the village submit to such regulations as should be made by certain three directors of the village or after them by the churchwardens of the church so long as no municipality should be established.

7. On the 7th April, 1858, the said Fourie transferred to the Board of Churchwardens for the time being of the Dutch Reformed Church at Heidelberg in trust for the said village, and to be used as a commonage: (*a*) Certain land being part of the farm Doornboom, lying to the west of the Duivenhoks River, and measuring 1,298 morgen and 310 square roods; (*b*) certain other land contiguous to that last mentioned, and also west of the said river, measuring 1,239 morgen and 589 square roods. The said pieces of land were by express provision in the title deeds transferred to the said churchwardens subject to the terms of the agreement of 14th September, 1855, and of the conditions of sale of December, 1855, hereinbefore referred to. But the grazing servitude constituted by the 5th clause of the said agreement for the benefit of owners of the erven in the village of Heidelberg was in error omitted to be registered against the title of the remaining extent of Doornboom, lying to the east of the Duivenhoks River, and retained by the said Fourie as his property.

8. The Municipality of Heidelberg, which includes within its area the land set apart for commonage, and the erven sold as aforesaid, was duly constituted under the provisions of Ordinance 9 of 1836 in or about the year 1862. The plaintiffs annex hereto a plan showing the position of the said erven and commonage, the course of the Duivenhoks River, and the boundaries of that part of the remaining extent of Doornboom over

which the servitude of grazing was granted by the said Fourie as aforesaid. The said boundaries are indicated by the letters A B C D E upon the said plan.

9. After the constitution of the said Municipality the Municipal Commissioners duly accepted and enforced as against the said Fourie the benefit of the servitude of grazing reserved by him as aforesaid in favour of the owners of erven, and the said servitude rights which are common to the said owners are now by law duly vested in the plaintiffs.

10. On or about the 14th August, 1877, the remaining extent of the said farm Doornboom, including the portion over which the said grazing servitude had been created, was sold by the said Fourie, and purchased at public auction by the defendant.

11. Notice of the existence of the said servitude was publicly given at the said sale to the knowledge of the defendant, and the defendant, when he purchased the said remaining extent, was fully aware of the existence of the said servitude and of the rights of the plaintiffs as representing the erfholders in connection therewith.

12. The remaining extent of the said farm was thereafter transferred by the said Fourie to the defendant without the existence of the said servitude being registered against the title deeds. But the plaintiffs submit that the defendant is by reason of the premises bound to recognise and give effect to the said servitude and to do all things necessary on his part to allow the existence of the said servitude to be registered against the title deeds of the remaining extent of Doornboom.

13. At divers times since the 14th of March, 1879, the defendant has wrongfully and unlawfully interfered with the due enjoyment of the said grazing servitude by the owners of erven in the village by himself depasturing and authorising others to depasture upon the said land, A B C D E, such large numbers of cattle, sheep, goats, and ostriches as to deprive of pasturage the stock which the said erfholders were allowed under the regulations and by virtue of the premises to graze upon the said land, and by enclosing or fencing off a portion of the said land near the southern boundary thereof.

14. By reason of the aforesaid wrongful acts the plaintiffs, as representing the erfholders, have suffered damage in the sum of £500.

The plaintiffs claim :

(*a*) A declaration that the owners of erven in the village of Heidelberg are entitled to graze upon that portion of the remaining extent of the farm Doornboom which is marked A B C D E upon the annexed plan such numbers of cattle, sheep, goats, and other stock as may from time to time be duly fixed by regulation.

(*b*) An order compelling the defendant to do all things on his part which are necessary to register the agreement of September 14, 1855, in the 5th clause thereof, against the title deeds of the remaining extent of the said farm, they on their part tendering to bear and defray all the costs of such registration.

(*c*) An order interdicting the defendant from depasturing stock upon the said land A B C D E to such an extent as to interfere with the enjoyment by the said owners of erven of the rights referred to in (*a*) hereof.

(*d*) An order restricting the defendant from enclosing any portion of the said land, and ordering him to remove the fence already erected by him thereon.

(*e*) Payment of the sum of £500 for damages as aforesaid, &c.

For a second count to this declaration the plaintiffs say :

1. They refer this Honourable Court to the matters set out in the first eight paragraphs of the first count.

2. By the transfers referred to in section 7 of the first count of this declaration, all the portion of the farm Doornboom lying to the west of the then course of the Duivenhoks River was transferred to the churchwardens aforesaid in trust for the said village and to be used as a commonage.

3. The course of the said river at the date of the agreement of 14th September, 1855, and of the said transfer is marked by dotted lines upon the plan annexed to the declaration.

4. Since the said date the said river has changed its course, and now runs considerably to the westward of the said old course. The position of the present bed of the river is also duly marked upon the said plan.

5. Between the old and the present course of the said river there is a piece of ground called the Binnevley, which is 19 morgen and 200 square roods, or thereabouts, in extent.

6. The said Binnevley, between the old and new courses aforesaid, is land which was included in the transfer referred to in section

7 (*a*) of the first count hereof, and the plaintiffs submit that the said land forms part of the commonage of the village of Heidelberg, and they say that it has always been used as such commonage.

7. The defendant wrongfully claims the said Binnevley as portion of the remaining extent of Doornboom, and denies that it forms part of the commonage, and he has on various occasions since 5th November, 1897, wrongfully driven off and impounded cattle and stock, the property of erfholders in the village, and lawfully grazing in the said Binnevley.

The plaintiffs claim :

(*a*) An order declaring that the commonage of Heidelberg extends eastward to the old course of the Duivenhoks River, as shown by a dotted line upon the annexed plan, and that the Binnevley aforesaid forms portion of the said commonage.

(*b*) An order interdicting the defendant from in any way interfering with the stock of the erfholders lawfully grazing on the said Binnevley, and from depasturing his stock thereon, &c., &c.

The defendant's plea was as follows :

1. He admits the first three paragraphs of the declaration, save that in paragraph 2 the word "plaintiffs" should be "defendant."

2. As to paragraphs 4, 5, and 6 he admits the allegations therein, save that for the terms of the agreement and conditions of sale therein referred to, he craves leave to refer to the documents themselves when produced.

3. As to paragraph 7, he craves leave to refer to the title-deeds of the said erven when produced, but he says that if any error was made therein, which he does not admit, the defendant is not responsible, or liable for, or affected by the same.

4. As to paragraph 8, he admits that the Municipality was constituted as therein alleged, but he does not admit the correctness of the plan referred to.

5. He has no knowledge of the allegations in the first part of the ninth paragraph, but he is willing that the servitude in favour of the erfholders mentioned in the 5th clause of the agreement in the seventh paragraph of the declaration referred to should be registered against his title-deed, on condition that plaintiffs discharge all the costs thereof ; and he contends that the said servitude gives no exclusive right to the erfholders to graze cattle and stock upon the said ground.

6. He admits paragraph 10, but he denies that when he purchased the said remaining extent he was fully aware of the existence of the said servitude and of the rights of the plaintiffs in connection therewith as alleged. He admits that notice of the existence of the said servitude was given at the sale in 1877, but he says that the auctioneer did not purport to sell subject thereto.

7. He denies that he has interfered with any of the rights of erfholders to graze upon the said portion of Doornboom, and he denies that any municipal regulations have been lawfully made for the said gound. He says he is entitled to graze his cattle, stock, and ostriches upon the said ground, and that he has done so lawfully and in a reasonable manner, but that plaintiffs deny the said right. He says that no municipal regulations have been made affecting the said ground, and no such regulations are valid which do not recognise his (defendant's) rights to graze cattle upon the said portion of Doornboom.

8. He admits the allegations in the first part of paragraph 12, but, save as above, he denies the allegations in paragraph 13.

9. As to the enclosure or fence referred to he says that the grievance complained of consists of an embankment made by him to lead water to his cultivated lands, as he had a right to do ; and he says further that the said embankment is not situated upon the property in respect of which a servitude is claimed by the plaintiffs.

10. He denies paragraph 14.

And for a plea to the second count, the defendant says :

11. As to paragraph 1, he refers this Honourable Court to the matters set forth in the plea to the first count.

12. As to paragraph 2, he craves leave to refer to the transfer deeds therein mentioned when produced.

13. He denies paragraphs 3, 4, 5, and 6, or that the river has to any material extent, and especially to the extent and in the manner shown by the plaintiffs, changed its course, and he says that the piece of ground marked "Binnevley" has always been, and is now, included within the limits of the land transferred to him, and not within the land transferred to the plaintiffs, nor does he admit the correctness of the plan annexed to the declaration.

14. He admits that he claims that the said Binnevley is portion of the remaining extent of Doornboom, his property, and that it does not form part of the said commonage, and that he has from time to time driven off and impounded cattle and stock the

property of erfholders, grazing on the said Binnevley. He says that he has done so ever since he became the owner of the said remaining extent. Save as above, he denies the allegations in paragraph 7.

For a claim in reconvention the defendant, now plaintiff in reconvention, says:

15. He craves leave to refer to the matters pleaded in the above pleas.

16. From time to time the defendants in reconvention have wrongfully and unlawfully interfered with his (plaintiff in reconvention) right to graze cattle and stock upon the said Binnevley, his property.

17. From time to time, and especially in or about the month of August, 1896, the defendants in reconvention have wrongfully and unlawfully interfered with the right of the plaintiff in reconvention to graze cattle and stock upon the portion of his property over which the defendants in reconvention claim servitude rights under the first count of the declaration, and have seized, for the purpose of impounding, cattle and stock, the property of the plaintiff in reconvention, or being lawfully thereon with his permission and consent. The defendants in reconvention contend that the plaintiff in reconvention has no right to graze cattle or stock upon the said portion.

18. By reason of the wrongful and unlawful acts of the defendants in reconvention as above set forth, the plaintiff in reconvention has sustained damages in the sum of £100.

Wherefore the plaintiff in reconvention claims:

(*a*) An interdict restraining the defendants in reconvention from interfering with cattle or stock belonging to the plaintiff in reconvention, or to persons authorised by him to graze cattle or stock, whilst the same are grazing upon any portion of his property, including the said portion styled "Binnevley."

(*b*) £100 as damages.

The plaintiffs pleaded to the claim in reconvention that the defendant had no right to interfere with the erfholder's enjoyment of the servitude and they had only removed stock from the land when the graying of such interfered with their enjoyment and after due notice.

Mr. Innes, Q.C. and Mr. Close, appeared for the plaintiffs.

Mr. Searle, Q.C. and Mr. McGregor for the defendant.

Wm. Greathead, Government land surveyor at Riversdale, said he knew Heidelberg very well. He had compared the plan of the ground put in with his own, and it was accurate. He had also prepared an enlarged section of the ground in dispute.

Richard P. C. Miller, a member of the Heidelberg Municipality, said he had lived in that village since 1857. For a long time there had been a dispute between the Municipality and Mr. Uys about the way in which the ground was used. For the last eight or nine years the land had been overstocked with cattle and ostriches, and things were getting worse almost every day. He had seen up to a thousand sheep running on the ground, and there was no ground left for the use of the Municipality. Complaints had been made to Mr. Uys, but things did not improve. He had talked to Mr. Uys on the subject, and he replied that he was determined to break the grazing servitude. A meeting was called in August, 1897, to consider the whole question, but Mr. Uys refused to attend. After that eleven hundred sheep were impounded, but they were released on payment of a fine. There was no grass on the field now. This ground. was reserved by the Municipality for a pasturage for cattle in times of drought The land would support about sixty cows, and the Commissioners would be satisfied if they got permission to graze sixty cows there. At present it was so bad that they could not use it for cattle, and this had caused great inconvenience, as the erfholders had been compelled to engage other ground for grazing purposes.

John Buchner said he signed the original agreement in 1855, but all the other parties to it were dead. He gave evidence with respect to the change in the course of the river in 1869. He knew the ground on which the servitude existed very well, and he had often seen large numbers of sheep grazing thereon.

Jacobus H. Ebersohn stated that he had seen between eight and nine hundred sheep on the servitude ground, and the result was that the pasturage was valueless to the village. There had been a gradual change in the course of the river, extending over a large number of years.

Jacobus Geldenhuis said that during last year the village got no benefit from the ground. owing to the number of sheep which were grazed there.

Johannes Geldenhuis said he had lived at Heidelberg since 1855. He agreed with the evidence already given with regard to the change in the course of the river.

Other corroborative evidence was given by Edward Marthinus Hoffman and Peter Jacobus Lombaard (members of the Municipality), and by a coloured shepherd.

James du Preez, secretary of the Heidelberg Municipality, gave evidence with regard to the regulations for grazing on the servitude-ground.

This closed the case for the plaintiffs.

Richard Rodney Hopley, land surveyor, of Swellendam, said on instructions received from the committee of fifteen mentioned in the agreement he surveyed the ground now in dispute, and also the river boundary. He had seen the river lately. The old river course was just the same as when he surveyed it in 1857; excepting a slight deviation above Binne vley. He produced the working-plan, which he made in 1857.

Cross-examined: He was perfectly certain that there had been no change in the river at this place, despite all the evidence given for the other side.

Pieter Johannes Uys, the defendant, said that he was sixty-four years of age, and previous to purchasing the farm Doornboom in 1877, he lived on a farm near Heidelberg. The course of the river was the same as when he bought the farm from Fourie's executors. From the time witness bought the farm he had exercised the rights of ownership of the land right up to the water, and had grazed his cattle there. When he bought the farm the auctioneer said transfer would be given up to the middle of the river. Since then witness had always impounded cattle in the Binnevley. He first heard about the municipality's claim to a portion of the Binnevley last year. He had never assented to any of the Municipal regulations with regard to that ground, but had allowed the stock of the villagers to graze there. It was important to witness that his land should extend to the river, so that his live-stock could be watered.

Albertus Jacobus van Eeden said that his father ived at Slangrivier, adjoining Mr. Uys's place, and that was where witness was brought up. From 1856 to 1862 he lived near Heidelberg, and was in the employ of Mr. Fourie. He was well acquainted with the course of the river and what was called the Binnevley. He had been there recently. At places the course of the river had changed, but the greater part had not changed. The river ran on the same side of the Binnevley (the west) as it did when witness was in Mr. Fourie's employ.

Hendrik Johannes Samuel Raal said that he was fifty-four years old, and up to eighteen years ago lived at Kruisrivier. All the time witness lived there Binnevley belonged first to Mr. Fourie, and then to defendant. Witness was at the sale of the farm, in 1877, and was one of the bidders. It was stated then that the farm ran up to the river. The only change in the course of the river was a little deviation above the Binnevley.

Frederik Reynhard Raal, a brother of the last witness, gave corroborative evidence. He had seen the river recently, and there had been no change in its course at the Binnevley.

Marthinus Gerhardus Bekkers, son-in-law of the defendant, stated that he hired the farm from his father-in-law. On the whole farm he grazed from 600 to 1,000 sheep and some cattle. As far as witness knew, no regulations had ever been laid down as to how many cattle the people should graze on the servitude-ground, and how many witness should graze.

Cross-examined: Witness had always had the right, whenever he wanted, to graze his cattle on the land in dispute.

P. J. Uys, the defendant (recalled), stated that he had never said to anyone that he would break the servitude. He had not said it was not on his title deed and that he would not admit it

Cross-examined: He did not remember saying that to Mr. Miller. He had had no conversation with Mr. Miller with regard to the servitude.

This closed the case for the defendant.

It was admitted that in 1879 the Commissioners of the Municipality passed a resolution authorising the defendant to graze 30 head of cattle on the land, and that he refused to accept this offer.

The record of an action in the Circuit Court of Swellendam in 1863 was put in. In this action the Municipality of Heidelberg was the plaintiff and prayed for an order interdicting Fourie, the present defendant's predecessor in title, from depasturing his cattle upon the land now in question. The order then made was "the defendant's right to pasture on the land in question restricted to such municipal regulations as may exist or may be made as regards his property in Heidelberg and as remaining owner of Doornboom."

Postea (May 27), the arguments of counsel were heard.

Mr. Innes: The erf-holders are entitled to a servitude over the farm and the owner cannot be allowed to interfere with their right. *Voet* (8, 3, 10) says that where such a servitude exists the owner of the servient tenement may also turn in his own cattle to feed at the same time so long as there is enough pasture for the two.

[De Villiers, C.J.: Is that clear? The word used is *quatenus*, which means "in so far as" not "so long as"]

The meaning is the same, viz.:—that the servient tenement has the right of grazing only when there is sufficient pasture for both. The agreement and the conditions of sale give indications of Fourie's intention, which was that the managers should make regulations; if they retired the Kerkraad, and, if a Municipality should be established, the Municipality should make regulations, He did this for his own protection and to prevent his land being flooded with cattle. The primary test therefore as to what is reasonable are the regulations? The only important regulation is as follows: "No. 31. Each householder liable to assessment for rates shall be entitled to keep horses, mules, oxen and cows on the public commonage to the number of sixteen in all, and sheep and goats to the number of ten, all being his own property; and every householder carrying on the trade of a butcher shall be entitled to the run of forty sheep above the specified number: and any householder desirous of keeping a greater number of such animals and all proprietors of neighbouring farms, who wish to run their cattle on the grounds of the Municipality, shall apply to the Commissioners for a licence, who, if they should find it consistent with the interests of the majority of householders, shall grant it for a payment, &c., &c."

[De Villiers, C.J.: This regulation cannot refer to the land in question.]

We are prepared to abide by the offer contained in the resolution of 1879 and allow defendant to graze thirty head of cattle As to the alteration in the course of the river, it is common cause that rivers like this can change and have changed. Hopley's evidence is not altogether reliable; there is an error of 77 morgen in his calculation of the area and in other respects his evidence is inaccurate. Buchner has lived at Heidelberg all his life and he and others of the plaintiff's witnesses have lived by the river side and herded cattle there, and are more intimately acquainted with the locality than the bulk of the witnesses for the defence.

Mr. Searle: We do not contend that we are entitled to graze to the exclusion of the erfholders, but the plaintiffs claim an exclusive right and we contend that they are not entitled to that.

[De Villiers, C.J.: Is it not a fair contention that the dominant tenement has priority and can take in the first instance whatever is necessary?]

There was no necessity to send so many cattle to the eastern side. *Voet*, in the passage quoted, does not mean to exclude the rights of the servient tenement. None of the erfholders say that they were prevented from grazing their cattle. In 1863 the Court held that Fourie had a right to pasture but restricted it to the Municipal regulations which should be framed. It was the duty of the Municipality then to frame regulations dealing with this land, but they did not do so. The word *vee* is used in the agreement and this includes both large and small stock. The Municipality cannot now object to the defendant grazing sheep there. The evidence is not sufficiently definite to enable the Court to decide how many cattle the defendant is entitled to graze. If regulations were framed the Court could then give a decision as to whether they were reasonable or not.

Mr. Innes, in reply, said he did not press the claim for damages.

De Villiers, C.J.: One of the questions to be determined is whether the defendant has grazed an unreasonable number of cattle upon the pasture land over which his predecessor in title had granted a servitude to the erfholders of the village of Heidelberg. The servitude was registered upon the title-deeds of the dominant tenement and not on the title-deeds of the servient tenement, but it is now admitted that, inasmuch as the defendant purchased the farm "Doornboom" with full knowledge of the servitude, he cannot object to a proper registration of it against his transfer deed. The granting of the servitude was one of the inducements held out by Fourie to intending purchasers of the erven which he proposed to sell and cut off from his farm on the west side of the Duivenhoks River. The piece of pasture land was situated on the east side of the river and over this land the owner granted to all owners of erven in the village the right of grazing their cattle "without any hindrance of any kind." It is not denied that the plaintiffs, as Commissioners of the Municipality, are entitled to represent the erfholders in this action. Their complaint is that the defendant has of late years allowed large flocks of sheep to graze on the pasture land, with the result that very little pasturage was left for the erfholders' cattle. This complaint is fully borne out by the evidence, which has further satisfied the Court that the grazing of any sheep on the land would be a serious hindrance to the enjoyment of the erfholders' rights. The pasture land appears to be barely sufficient for the erfholders' wants but in the year 1879 the Commissioners passed a resolution authorising the defendant to graze thirty head of cattle on the land, and by the offer contained in this resolution they are still prepared to abide. The defendant refused the offer and his lessee has since practically asserted the right to graze as many sheep or cattle as he chooses upon the pasture land. In my opinion the grant of the servitude is wholly inconsistent with such a right. The owner of the servient tenement has the right to depasture his own cattle on the land but, as remarked by *Voet* (8, 3, 10), only to the extent to which the pasturage is sufficient for the cattle of the owner of the dominant tenement and himself. If the pasturage is just sufficient for the reasonable wants of the dominant tenement the owner of the servient tenement cannot, in derogation of his own grant, do anything whereby such pasturage would be rendered insufficient. On the other hand it should be observed that the grant applies only to the erfholders' cattle, and therefore any Municipal regulation whereby the Commissioners are authorized to grant licenses for the grazing of strangers' cattle is clearly not binding upon the defendant. The result is that the Court will make an order in terms of prayers (*a*) and (*b*) of the declaration, and as to (*c*) will interdict the defendant from grazing any sheep on the land or more than thirty head of other cattle at any one time. As to prayer *d*, it seems to me that the present road, as it lies now, should be the boundary. There should be some natural or clearly-defined boundary, and the present road seems to me to offer such a defined boundary. No order will therefore be made in respect to prayer *d*. As to prayer *e*, the claim for £500 for damages, there were really not much damages proved, and on the whole I think that £5 damages would meet the justice of the case. I come now to the next question, that of the plaintiffs' claim to the portion of land called the Binnevley. Upon that point there has been great conflict of evidence. According to the plaintiffs' witnesses the course of the stream has been on the east of the Binnevley only since 1875, when the present course was assumed. I think that the witnesses called for the defendant are men who seem to be perfectly impartial, men like Mr. Van Eeden, who formerly worked on Doornboom, and the brothers Raal, who were neighbours, and who swore that so far as they could remember the course has been almost identical with the present one. With this conflict of evidence the Court is bound to attach the greatest possible weight to the evidence of Mr. Hopley, who is the man who made the survey, and who had accordingly made an examination of the ground for that purpose. Mr. Hopley swears positively that when he made the survey in 1857 the river had the same course as to-day. This evidence is supported by the diagrams produced, upon which transfer has been passed. In that diagram the course of the river is almost the same as the present course. It is quite true that the Court has always held that where diagrams are in opposition to the body of the grant the grant takes priority. But in this case there is no such conflict. In this case the question is as to what course the river had at the time the grant was made. None of the other witnesses were with Mr. Hopley when he made his survey; and after all his evidence may be consistent with that of the other witnesses, for it is possible that when Mr. Hopley made his survey the river had its present course, that it may have changed its course to that mentioned by the plaintiffs' witnesses, and then after 1875 come back to its present channel. I am satisfied that at the time Mr. Hopley made his survey that the course of the river was pretty much the same as the present course. The plaintiffs wish it to be declared that the boundary shall be the old course on the river, but in my opinion this claim cannot be allowed, and therefore judgment must be for the defendant on the second count. The claim in reconvention is really upon the impounding of stock on the servitude ground. There is also a prayer that the plaintiffs be interdicted from trespassing upon the Binnevley. Of course that will follow from the judgment of the Court already indicated with regard to the Binnevley. There is therefore no necessity for making any order upon the claim in reconvention. The real difficulty in this case is how to deal with the question of costs. Usually where the plaintiff succeeds, and there has been no tender on the part of the defendant, the plaintiff must have his costs. The present case can not be taken out of the ordinary rule, and there having been no tender, the defendant must pay the costs. But then as to the witnesses. Most of the witnesses for the defence were really called upon the question of the Binnevley land, while on the other hand a great many of the plaintiffs' witnesses have been called upon the question of the servitude ground. Upon the whole, I have come to the conclusion that each party should pay his own witnesses' expenses. Therefore in giving judgment in the terms indicated, witnesses' expenses will not be included in the costs, and each party must pay his own witnesses' expenses.

Buchanan and Maasdorp J. J. concurred.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Defendant's Attorneys, Messrs. Van Zyl & Buissiné.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., (Chief Justice), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

SOLOMON V. WOLFF. { 1898. May 26th.

Arrest—Attachment *ad fundandum jurisdictionem*—Security—Jurisdiction—8th Rule of Court—Domicile—Security.

A person who cannot, because of being a non-resident, be summoned by the ordinary process of the Court cannot be arrested under the 8th Rule of Court, and, therefore, where it is made to appear that a person so arrested is a non-resident the Court will order the discharge of the writ but may there and then make an order for the attachment of the defendant's person ad fundandam jurisdictionem *and for the giving of sufficient security to perform the judgment of the Court.*

Schunke *v.* Taylor and Symonds (*8 Juta, 103*) *approved.*

This was an application on notice to the respondent to show cause why a writ of arrest should not be set aside with costs. This being the return day of the writ, the respondent prayed for its confirmation.

The applicant, Henry Solomon, of Johannesburg, set forth that he was domiciled in that place, but was at present on a temporary visit to this city, and had no intention of returning to the Transvaal immediately. That late on Saturday night, at 6.30, he was arrested at Sea Point in answer to a claim by the respondent for £20,000, which the respondent alleged was due to him for moneys received and drawn from the firm of Victor Wolff & Co. in 1890 and 1891 at Kimberley and Cape Town. That he had no knowledge how the respondent arrived at his claim of £20,000. That he was in partnership with the respondent from 1888 to 1890, but from 1890 to 1896 no claim had ever been made upon him. That in 1896 he received a summons in London from the respondent, who was then in Johannesburg. This summons claimed £3,968 and a certain share of £16,758, and it was served upon him about forty-eight hours before his departure for the Cape of Good Hope, evidently with the intention of keeping him in London. That he entered appearance, but had heard nothing more of the action. He denied that he owed the respondent any sum of money, and said that for some years after the dissolution of the partnership Wolff was resident in Johannesburg, and could have sued him there. That for the last eight years the said Wolff had done all in his power to injure and annoy him, and that had applicant not been able to find security to abide the action late on Saturday night, he would have been subjected to the indignity of spending Sunday in the Cape Town Gaol.

The respondent filed an affidavit in which he traversed many of the applicant's statements and alleged that an investigation of the books of the partnership firm showed that £3,968 was due to the respondent as liquidator of the firm's affairs, and £16,758 had to be accounted for by the applicant as having been drawn by him. He alleged further that he had heard from one Henderson and other friends of the applicant that he intended returning to Johannesburg on Sunday morning unless he heard that his wife was leaving there on Monday, in which case he would remain in Cape Town until Wednesday.

His affidavit was supported by Godfrey Davis, of Cape Town, who had been engaged in making up the books of the firm.

The arrest had been made by virtue of a writ issued under the 8th rule of Court upon an affidavit sworn to on the 21st inst. by Wolff, who therein stated that the applicant was leaving Cape Town that evening or the next morning for Johannesburg.

An answering affidavit was filed by the applicant, in which he denied the statements made by the respondent and Davis with regard to the partnership affairs.

Mr. Schreiner, Q.C., for the applicant: The writ was granted under Rule 8, and, therefore, the requirements of that Rule must be fulfilled: there were, however, no grounds for belief that the applicant was about to remove from the Colony.

[De Villiers, C.J.: That would be implied from the fact that he is here for temporary purposes. A stronger point is whether Rule 8 can be applied in the case of a foreigner. There should be an application to attach *ad fundandam jurisdictionem.*]

I admit that there is an initial jurisdiction in the Court since the debt arose in the Colony, but there must be an attachment *ad firmandam jurisdictionem.* The applicant is willing to abide by the jurisdiction and has no desire to evade it. The procedure of the Court has been abused. The respondent should have stated in the affidavit made before the Registrar that he knew there was a contingency about the applicant's leaving. *Van der Vyver* v. *Deary* (6 Sheil, p. 466).

Mr. Innes, Q.C. (with him Mr. Searle, Q.C.) for the respondent: It was laid down in *Einwald* v. *The German West African Company* (J. 5, p. 86) that without there being jurisdiction *ratione domicilii rei sitae* or *contractus* there can be no jurisdiction over the property. If there is jurisdiction the plaintiff can attach the defendant's person or property and as regards property the procedure to be followed is that prescribed in Rule 8.

[De Villiers, C.J.: *Taylor and Symond* v. *Schunke* (8 Juta, 103) is an authority to the contrary in the case of a foreigner not domiciled here.]

Mr. Schreiner, Q.C., in reply to the Court stated that the applicant was willing to give security to the extent of £4,000.

De Villiers, C.J.: It is admitted that the applicant is not a "resident' in the sense that he could be called upon by the ordinary process to appear before the Court. He resides at Johannesburg and is on a short and temporary visit to this Colony and, although the cause of action is said to have originated here, the jurisdiction of this Court should be "founded" or rather "confirmed" before an ordinary summons could be effectual. It is said on behalf of the respondent that inasmuch as he had made a statement on oath that the applicant was about to remove from the Colony, the writ of arrest was properly sued out under the 8th Rule of Court. That Rule, however, as was pointed out in *Schunke* v. *Taylor* (8 Juta, 105), does not apply to persons not resident in this Colony. It is unnecessary now to discuss the nature and period of residence required to justify the summary process of arrest but it is sufficient to say that a residence sufficient for an ordinary summons would be sufficient for a writ of arrest against a defendant about to remove from the Colony. A plaintiff who sues out a writ of arrest does so at his own risk. It has been the invariable practice, except where the defendant has duly entered appearance, for the plaintiff to apply to the Court on the return day for a confirmation of the arrest. Where the objection is raised that the defendant is a non-resident the Court would discharge the writ but would also there and then make an order for the attachment of his person *ad fundandam jurisdictionem* and for the giving by him of security. The Court might even order the defendant to pay the costs of the arrest if it were clear that a prompt arrest was necessary in the interests of justice. In the present case it is by no means clear that the applicant intended to remove forthwith from the jurisdiction. The respondent's claim appears to be excessive even if his affidavit is correct, and there was ample opportunity for him to apply to the Court for an attachment instead of suing out a writ of arrest. The Court will therefore discharge the writ with costs and, while making an order for the attachment of the applicant's person *ad fundandam jurisdictionem*, will reduce the amount for which security is to be given from £20,000 to £4,000.

Buchanan, J., concurred: If the parties had consulted the judgment in *Schunke* v. *Taylor* they would have found the proper course for them to follow clearly indicated and have been saved the expense of the proceedings they have adopted in this case.

Maasdorp, J., concurred:

The plaintiff was further ordered to proceed with his action in the next term.

[Applicant's Attorney, Gus Trollip; Respondent's Attorneys, Messrs. Van Zyl & Buissiné.]

ADMISSIONS. { 1898. May 26th.

Mr. Innes, Q.C., moved for the admission of Edward Wingfield Douglass as an advocate of the Court.

The order was granted, and the oath administered.

Mr. McGregor moved for the admission of Bismarck von Moltke Louw as attorney, notary, and conveyancer of the Court.

The order was granted, and the oath administered.

Mr. Buchanan moved for the admission of Edmund James Wood as a conveyancer of the Court.

The order was granted, and the oath administered.

Mr. Jones applied for the admission of Gustav Adolph Stoltenhoff as a translator in English and German to the Court.

The order was granted, and the oath administered.

PROVISIONAL ROLL.

PARKIN V. SMALL.

Mr. Buchanan applied for provisional sentence for a sum of £450, due on a mortgage bond, with interest at the rate of 10 per cent. from August, 1897. The bond had become due upon the non-payment of the interest. He also asked that the property specially hypothecated be declared executable.

The order was granted.

[Before the Hon. Mr. Justice BUCHANAN and Mr. Justice MAASDORP.]

REHABILITATION. { 1898. May 26th.

Mr. Close applied for the rehabilitation of the estate of the late Izaak Adonis.

Order granted.

GENERAL MOTIONS.

BLEKSLEY (OTHERWISE SLOAN) V. SLOAN.

Mr. Currey moved that the rule *nisi* granted in this case, calling upon the respondent to show cause why the petitioner should not be allowed to sue *in forma pauperis* for a decree of nullity of marriage, be made absolute.

The rule was made absolute. Mr. Currey was appointed counsel for the petitioner, and Mr. Godlonton was appointed attorney.

IN THE MATTER OF THE MINOR JOURDAN.

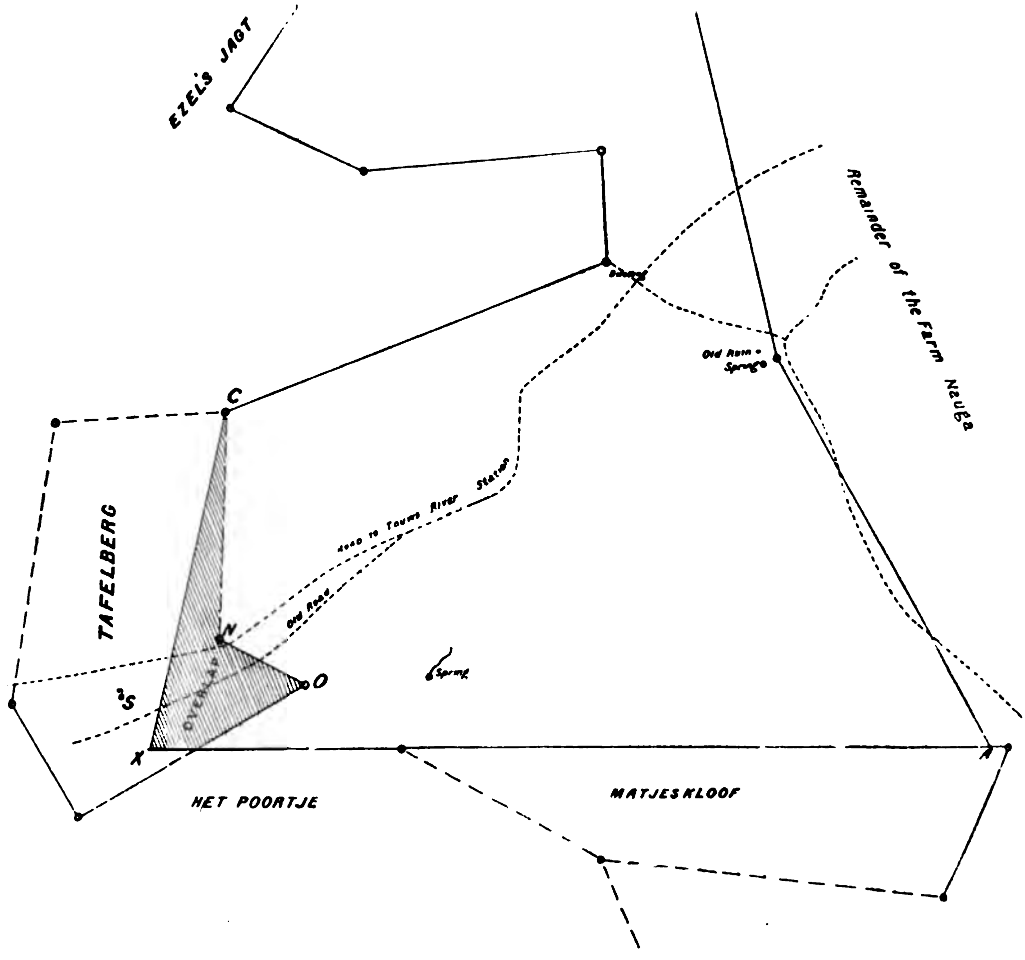
Mr. McGregor moved for an order authorising the Master to pay certain moneys towards the completion of the minor's education. The petition showed that the interest on the capital sum inherited by the minor was insufficient to enable him to complete his studies as a mining engineer. The minor was now in his nineteenth year, and £150 per year would be required for the purpose mentioned. The Master's report was favourable.

Order granted.

IN THE MATTER OF THE FREE STATE PROSPECTING SYNDICATE, LIMITED

Mr. Close appeared for the petitioners, the directors of the syndicate, and applied for an order placing the said syndicate in liquidation, and for the appointment of liquidators. The petition showed that the syndicate was duly registered under the Companies Act, with a capital of £4,700, £3,350 of which was working capital. The whole of the working capital had been expended in prospecting and developing properties in the Orange Free State without any satisfactory results. On March 20, 1898, a meeting was held, and it was resolved that the syndicate go into voluntary liquidation. Owing to shareholders having lost all interest in the syndicate, the resolution could not be confirmed, it being impossible to get a quorum together. Application was therefore made to the Court to have the syndicate placed in liquidation.

The usual order, in terms of section 149 of Act 25 of 1892, was granted, Messrs. Hands & Shore being appointed liquidators.



CAPE TIMES LIMITED

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice) the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

HUGO V. RUSSOUW AND OTHERS.
1898. May 27th. „ 28th. June 9th.

Boundary of farm—Overlap.

Where there is an overlap in the boundaries of two farms and no beacons can be found to assist the Court the older grant must be allowed to prevail.

This was an action for a declaration of rights as to the boundaries of certain farms.

The declaration alleged as follows:

1. The plaintiff is the owner of certain ground being portion of the farm Nauga, in the Field-cornetcy of Achter Hex River, district of Worcester; the defendants Johannes Petrus Stephanus Rossouw, Pieter Willem Rossouw, and Daniel Jacobus Rossouw are owners in undivided shares of the farm Tafelberg, which adjoins part of the western side of the plaintiff's farm; the other defendants are similarly owners of the farms Poortje and Matjeskloof, which adjoin the southern boundary of the said farm. The owners of the farms Poortje and Matjeskloof are joined in this action, in order to obtain a declaration of rights regarding the position of a certain beacon, as hereinafter set forth.

2. The original grant of the farm Nauga, now owned by the plaintiff, is dated 1st November, 1838; the grant of the farm Tafelberg was issued in the year 1894, on the 15th August, and the grants of the farms Poortje and Matjeskloof bear date the 27th December, 1825, and the 11th September, 1862, respectively.

The plaintiff attaches hereto a diagram, marked "A," showing the position of the various farms aforesaid, to which he asks leave to refer this Honourable Court.

3. The south-western corner beacon of the plaintiff's said farm is the point marked X upon the said plan: the western boundary of the said farm, so far as it adjoins the farm Tafelberg, is the line X C upon the said plan; and the southern boundary of the said farm, so far as it adjoins the farms Tafelberg, Poortje, and Matjeskloof, is the line X A upon the said plan.

4. The said beacon at X was an original beacon of the plaintiff's said farm, and has been in existence for a period far longer than 30 years, and the plaintiff and his predecessors in title have for a period longer than the period of prescription as of right used and occupied the land up to the said lines XC and XA as included in his said farm, and is entitled to continue to occupy it.

5. Ever since the year 1894 the defendants, the owners of the farm Tafelberg, have wrongfully and unlawfully trespassed upon the south-western portion of the plaintiff's farm by depasturing cattle and otherwise making use of it, and they have erected two beacons upon the plaintiff's land at the points marked N and O upon the said plan, which they wrongfully claim to be beacons of their farm Tafelberg.

6. During the year 1897 the defendants, the owners of the farm Matjeskloof, have wrongfully and unlawfully trespassed upon the plaintiff's land to the north of the line X A by grazing stock upon it and otherwise, and they claim a right so to do.

7. By reason of the wrongful and unlawful acts aforesaid, the plaintiff has suffered damage in the sum of £500 and £250 respectively.

The plaintiff claims:

(*a*) An order declaring that the said beacons at N and O are upon the plaintiff's ground, and compelling the said first-named defendants to remove them.

(*b*) An order declaring that the line X C is the boundary between the farms Nauga and Tafelberg.

(*c*) An order declaring the line X A is the boundary between the farms "Nauga" and Tafelberg, Poortje, and Matjeskloof.

(*d*) From the first three defendants payment of the sum of £500 for damages, and from the defendants, the owners of Matjeskloof, payment of the sum £250 for damages as aforesaid.

The defendants pleaded as follows:

1. They admitted paragraphs 1 and 2 of the declaration, save that they did not admit the correctness of plan A in all respects.

2. They denied paragraphs 3, 4, 5, 6 and 7.

3. They said that the original corner beacon of Nauga which the plaintiff contended to be at X was in truth at or near N and that lines running from C to N and from N to O would correctly represent the boundary of Tafelberg in that direction.

4. That the beacon marked O denoted the original corner beacon of the farm Het Poortje granted in 1825 but that it was not adopted as a beacon of Nauga at the subsequent survey thereof.

5. That the triangular piece of land N A O was not included in the subsequent original grant of Nauga in 1838 but was and is ungranted by the Crown though subject to such rights as the plaintiff and predecessors had established thereto by prescription.

6. The owners of Matjeskloof said that they and their predecessors in title had since 1862, the year of their grant, regarded the said piece of land, and more especially a certain spring thereon, as land which they and the owner of Nauga were both entitled to use; they however, referred the Court to the description of the boundaries of Matjeskloof wherein it was described as bounded by Nauga in that direction, and said they were willing to recognise O A as the common boundary of those farms, without prejudice to their right to use the said land and spring as they had used it for thirty years.

The owners of Tafelberg claimed in reconvention an order declaring C N and N O to be the boundaries of that farm, the owners of Het Poortje claimed an order declaring O to be its corner beacon abutting on the triangular piece of ground N A O but not upon the original boundary of Nauga at any point. The owners of Matjeskloof claimed an order declaring O A to be its boundary towards Nauga and that they are by prescription entitled as against the plaintiff to the use of the land N A O and the aforesaid spring thereon.

Mr. Innes, Q.C. (with whom was Mr. Gardiner), appeared for the plaintiff.

Mr. Schreiner, Q.C. (with whom was Mr. McGregor), for the defendants.

As it appeared during the course of the case that the Colonial Government might possibly have some interest in a portion of the land in dispute, at the suggestion of the Chief Justice, Mr. Sheil, Q.C., appeared to watch the case on behalf of the Government.

Louis Changuion, a land surveyor, residing at Robertson, said he knew the farm Nauga, and in August, 1894, he was employed to survey plaintiff's share of that farm. When witness went there in 1894, the south-western beacon, the one in dispute, was not up. The other beacons higher up were in position. Witness had the original diagram (produced) and set out from that to find out the correct position of the south-west beacon. He threw the beacon at a different position (S on the plan) from that now claimed. Plaintiff was not satisfied with that beacon, and claimed the beacon marked X on the plan. In any case, whether the beacon was placed where witness decided it should be, or at the place plaintiff wanted it, the beacons N and O, claimed by defendants to be the boundary, would be included in the ground of the farm Nauga. The beacon marked O witness could not make fit in in any way. His theory was that it being on the highest point of the range it was used as a surveying station by the surveyors. There was no beacon at X. There was an old beacon upon the ground shown witness by a herd in defendant's employ as a beacon of Poortje.

Cross-examined: When witness made the survey in 1894 there was a beacon at N, which would be of about the same age as the beacon at O. The old surveyors usually made their measurements with chains, and would not be quite accurate in the case of rough ground, such as was to be found there.

Re-examined: The distance between the beacon S witness fixed, and the beacon X claimed would be about 800 yards.

Pieter Barend Woller Hugo, the plaintiff in the action, said he lived at Wildervley, near Goudini-road Station. Witness was now fifty-four years of age. He now owned part of Nauga. His father and a Mr. Van der Merwe were the original grantees. When witness was a boy he was familiar with the beacons. There was a partition of the farm in 1859. Mr. Aling surveyed it. In 1869 Mr. Aling pointed out the corner beacons to P. Hugo, who lived on the farm under witness. X was one of these. Hugo pointed out the spot to witness, and afterwards witness pointed it out to Mr. Changuion. Witness had also in 1874 shown Mr. Hopley, who was surveying adjacent Crown land, the beacon, which was then standing at X. The old road marked on the plan witness remembered for thirty years. Witness knew nothing about the Burgers always using the water from the spring under the rand. They might have used it without his knowledge or permission. Witness had first seen the beacons at N and O in 1894. Witness first noticed the disappearance of the beacon at X in 1894, when he went with Mr. Changuion to look for it. They could not find it, and then Mr. Changuion said, according to the diagram he would have to place the beacon at S. Afterwards witness went with Mr. Van der Merwe, and fixed the line at X. It was not until that was done that witness became aware of the fact that Mr. Burgers had built a dam. He saw Mr. Burgers, and the latter requested leave for his sheep to remain eight days, which witness granted. Mr. Burgers pointed out the line where he said Mr. Aling had told them to put up a beacon. Witness had always used the land up to X.

Cross-examined: Witness became the owner of the farm about four years ago, on his father's death. Witness had never seen the beacon at N until 1894. He had often passed the spot before that, it being a public road. He had never seen the remains of a masoned beacon near there. He had also seen the beacon at O for the first time in 1894. Jacob van Rooy was squatting on his father's ground, but not at the spot where the beacon N now is, and witness's father went to the Magistrate to get him to turn Van Rooy off that ground.

Pieter Hugo said that he now lived at the other side of Touw's River Station, but formerly lived for a number of years at Nauga as overseer. He remembered Mr. Aling coming to examine the beacons about thirty years ago. In consequence of something Aling told witness he went to a certain spot and found a beacon (X). Subsequently he pointed out that beacon to plaintiff and others. The beacon was 2½ feet high, but subsequently they raised it to 5 feet high. They went again to the place in 1895, and the beacon was gone. There was a footpath leading to near the beacon. There was no beacon at N in witness's time.

Cross-examined: Witness was of opinion that someone must have carried away the stones from the beacon, for when, in 1895, witness and the two Hugos went to the place and found the beacons gone, there were not enough stones lying round about to form the beacon. Vaalfontein, where the spring was, lay 1,100 to 1,200 yards from the beacon.

Francis Hugo, a distant relative of the plaintiff, said he had known Nauga for more than forty years. Witness corroborated plaintiff's evidence as to pointing out to Hopley in 1874 of beacon X, and as to his accompanying plaintiff and another Hugo in 1895 to the place where the beacon had stood, and finding it gone. He had never seen a beacon at Nieuwekraal (N) until after Mr. Molteno had surveyed there. Winess's father had hired the farm Nauga from old Mr. Hugo from the witness's earliest recollection down to thirty years ago. They used the spring in question, but so far as he knew the people at Matjeskloof never did.

Jacobus Hugo van der Merwe, at present living at Montagu, said he was in his seventy-fifth year, and was a son of old Mr. Van der Merwe, one of the original grantees of the farm Nauga. Witness remembered the farm from his earliest days. In 1837 or 1838 Mr. Meiring surveyed the farm, the south-west beacon X was then put up. There was no beacon then at Nieuwekraal, although the party with the surveyor outspanned there. Witness remembered Mr. Kannemeyer, a surveyor, coming to the farm in 1858 about some dispute. Witness took Kannemeyer to the beacon at X, which was then standing and was about three feet high. In 1896 witness was asked to point out where the beacon at X was. He went to the same place where he had taken Kannemeyer in 1858, bnt the beacon was gone. He thought it was probable that a mistake had been made, as it was twenty years since he had been there, and they went down the line in the direction of the spring in the triangle A N O, which he remembered having visited with Mr. Kannemeyer. Witness remembered Jacob Rooy living near to Nieuwekraal, and attempted to turn him off, but he would not go.

Cross-examined: Witness had lived at Montagu since 1857.

Pieter Johannes van der Merwe, sixty-four years of age, and brother of the last witness, said he had known the farm since he was a boy, and afterwards purchased his father's share of the farm. There was not a beacon at Nieuwekraal then. In 1859 Mr. Aling subdivided the farm, and one day, when he was at the south-west beacon X witness was with him. In 1883 Aling was again at the farm, and surveyed along the line from X to A. Witness was with him.

By the Court: Witness had always reckoned beacon X and beacon A as his boundary. He had never been to beacon X, but he went along the line with the surveyor, and the latter pointed out the smoke rising from a fire he had lighted at beacon X.

Daniel Stephanus Botha stated that he had lived at Nauga from 1881 up to a few months ago, acting as overser for the plaintiff. When witness went there, there was no beacon at Nieuwekraal (N), but there was one at Witteklip. There was no beacon at O. Witness pointed out the Witteklip beacon to Mr. Molteno when he was there. Witness pointed out no other beacons. He did not know who put up the beacons at N and O. Shortly after witness went on the farm, in 1881, the beacons at X and Witteklip were pointed out to witness by the owner of the farm.

By the Court: But the owner has stated that he had never seen beacon X since 1874.

Witness was certain Mr. P. B. Hugo, the owner, pointed out beacon X to him.

Examination continued: Witness had twice impounded cattle belonging to Burger on the land in dispute.

Cross-examined: Before Mr. Molteno came in 1887, witness was not aware of any beacon at Nieuwekraal. There were several heaps of stones lying about there. Witness did not know of the existence of a heap of stones where the beacon was put. Witness had never seen the remains of an old masoned beacon near N.

This closed the plaintiff's case.

For the defence,

Gert Greef, a Government land surveyor, gave evidence as to a compilation prepared by him. He fixed the beacons of Tafelberg from survey. He surveyed for the purposes of this case four weeks previously and fixed the beacons appearing in the compilation. At point N, when witness surveyed, there was a clearly defined beacon, and some 30 yards away there were distinct signs of a very old masoned beacon. It was overgrown with bushes. O was also a well-established conspicuous beacon, and it could be seen to be of old foundation. The dam shown on the plan was on Matjeskloof ground, but it would be lost to Matjeskloof if plaintiff's claim was upheld.

Cross-examined: The plan put in was compiled by witness from the old plans, and the three beacons which he surveyed.

Johannes Hendrik Burger, one of the defendants, part owner of Poortje and Matjeskloof, said he was in his seventieth year. Witness's father was the owner of Poortje before witness. Witness first became familiar with the farm when he was about eighteen or twenty years of age. Matjeskloof they bought from De Vos immediately after its sale in 1862 by the Government. He knew the beacon O, which had been on the spot for forty years. There was a large bush near it. That beacon could be seen from the road. Witness had also always seen a beacon at Nieuwekraal (N). He had known it to be standing there for more than forty years. It stood near to the spring where the people outspanned. Witness had always grazed his stock as far as possible towards O. Witness and the other owners had made the dam on Matjeskloof. They made that dam more than thirty years ago. The owners of Nauga had never complained of the dam being made or stock watered there. Witness knew the small spring between Matjeskloof and Nauga. They bought the farm for the purpose of getting that spring, but afterwards found they would not get it, as it would not fit in.

Cross-examined: He did not live on the farm, but went there every year, when his stock were there for grazing. Witness had not seen the beacon at N for twenty or thirty years, as he had not passed that way. He could not say who had first pointed it out to him, but everybody he had asked had said it was the Nieuwekraal beacon. The beacon at O had been pointed out to witness by a shepherd in his father's employ. It was a masoned beacon, and was about three feet high. He had not seen the beacon recently. The last time he had seen it it was still masoned, but lower in height.

Re-examined: Witness sent Verreyne to make up the beacons, as they had fallen down.

Jacobus Arend Burger, a cousin of the last witness, and formerly one of the co-proprietors of Poortje, said he had never seen the beacon at O, but had known the direction in which it was for a long time. He had known the beacon N for more than forty-seven years. Up to a few years ago he had never heard of a beacon at X, where plaintiff claimed there had been one.

Cross-examined: The beacon at N was a masoned one. The last time witness saw it was about 188[illegible].

Jacobus Daniel Kriel gave corroborative evidence as to the existence of a beacon at N more than forty years age.

Abraham Verreyne, who was formerly overseer at Poortje for Mr. Burger, gave evidence as to pointing out beacons to Mr. Molteno, a surveyor. He gave corroborative evidence as to the existence then of beacons N and O.

Pieter Botha Cloete had been much in the direction of Nieuwekraal and had seen a heap of stones there, which he did not look upon as a beacon until Mr. Molteno put a flag there. The beacon at O he had not noticed until after Mr. Molteno's survey.

Frank Molteno, registering surveyor attached to the Deeds Office, said he formerly practised as a Government land surveyor, and surveyed the farm Tafelberg in 1887, before its sale by the Government. After getting information from Mr. Cloete, he found a beacon at N, which he adopted as the south-west beacon of Nauga. He saw Mr. Botha, who was then caretaker of Nauga, and clearly informed him where he had found that beacon, and that he had placed a flag on it, and Mr. Botha was perfectly satisfied. He went to Poortje, where the witness Verreyne pointed out the beacons at N and O. There was no doubt in witness's mind that N and O were properly-made beacons, and not mere heaps of stones.

By the Court: Witness had the diagram of the farm of Nauga with him, and it did occur to him that it threw the farm out of shape.

Examination continued: According to witness's survey, the land within the beacons N A O could never have been granted away. Botha never made any claim to have the boundary at X. If X were the beacon, witness was satisfied that a considerable portion of the older grant of Poortje would be cut off. He could not always be guided by the difference in the length of the lines of the old diagrams. He had had much experience with regard to that, and found that the lines in the old diagrams seldom agreed in length with the surveys.

Cross-examined: If it had been pointed out to witness at the time he fixed upon N as the beacon that there was another old road with a beacon at X he would certainly have had the owners there before deciding upon N. He did not remember any sign of masonry on the beacon N, which was about three-quarters of an hour's drive from the house, and not visible from it. He could give the actual length of the line C N, but there was a considerable difference between it and the old diagram. He did not give notice to the plaintiff of his intended survey as Mr. Botha was perfectly satisfied with the beacon at N.

Johannes Petrus Stephanus Russouw, one of the defendants and part owner of Tafelberg, said the owners bought that farm according to the beacons, which were there when they bought the farms. He knew the corner beacon of Poortje, which was there when they bought the farm, He had outspanned there in 1860, and outspanned on the road marked. There was then a beacon standing at N, lower down than where the beacon now stood. There were still the remains of an old beacon at the place where witness saw one in 1860, between 80 and 100 yards from where the present beacon stands. He had known the present beacon at N to be there for at least twenty years. Witness and the other owner of Tafelberg objected to the beacon being placed at S by Changuion. They came to Cape Town and saw Mr. Melville at the Surveyor-General's Office, and the outcome of their visit was that the beacon at S was removed. Even then he had never heard of any claim to a beacon at X. There was no indication of there having been an old beacon at X. There was what looked like an old footpath a certain length of the way to X, but as long as witness could remember that road had not been used.

Pieter Willem Gabriel Russouw, another of the defendants and part owner of Tafelberg, said he had known the beacon at Nieuwekraal for fourteen years. Until Changuion came they had never heard of any claim to any other beacon for Nauga. He corroborated the evidence of the last witness as to the existence of the remains of an old beacon at Nieuwekraal and the present beacon. Those beacons were the identical stones, according to which they had bought the farm. He had never heard of a beacon at X until after Changuion's last survey.

This closed the case for the defence.

After argument,

The Chief Justice said: In this case there are three beacons in dispute, the beacons N, O, and X. The plaintiff is the owner of the farm Nauga, and claims the beacon X and the beacon A, the latter being admitted by all parties. He claims that the lines C X and X A shall be declared to be his boundary. The effect of accepting these lines would be to deprive Poortje of a considerable portion of land, and also to deprive Matjeskloof of about one-third of the land granted to it. The plaintiff says that this beacon X is an old beacon, and that it was placed there at the time of the original survey of Nauga. The evidence upon this point is far too vague to be of any importance in the present case. It is said that the surveyor was seen to go in the direction of where the beacon X stands, but beyond that there is no evidence that the beacon was pointed out at the original survey of the farm, and further, there is no clear evidence that the beacon at

X was recognised for thirty years as the beacon of the farm Nauga. At one time, it is alleged to have been the beacon of a certain road; but at other times—for instance, when the surveyor, Mr. Changuion, came there—there was no longer any beacon in existence there. I think, therefore, that there is not sufficient evidence to prove that a beacon at X was ever pointed out at the original survey or that such a beacon stood there for thirty years. The beacon N, in my opinion, is equally doubtful. There is no doubt but that at some time or other, when several of the witnesses passed there, there were heaps of stones which resembled beacons. Probably they were beacons, but there is no evidence that at any time a beacon in the neighbourhood was recognised as a beacon of the farm Nauga. It seems to me to be extremely probable that inasmuch as there were squatters about that neighbourhood, these squatters may have amongst themselves put up these beacons in order to indicate roughly to what extent each of these squatters should be allowed to occupy. This is merely a theory, but at all events it explains the existence of these beacons, which would otherwise be unexplainable. One of the witnesses for the defence, one of the defendants in fact, says that in 1860 he saw a beacon near there, but he also adds that the beacon standing there now is 100 yards from the beacon which he saw in 1860, thus showing how shifty it was and how difficult it is for the Court now to attach any weight to those heaps of stones which are said to be in the immediate neighbourhood of beacon N. There is no proof, at all events, of the beacon ever having been recognised by any of the owners as a beacon of the farm Nauga. Then we come to the beacon O, and as to that there is evidence that it has been a recognised beacon. The evidence of Mr. Johannes Burger is clear upon that point. He is an old man, seventy years of age, and from the time that he was seventeen or eighteen years old he remembers that this beacon stood there. It stands, however, upon a prominent point, and is easily visible from all parts. But what is of more importance in this case is that the occupation of the farm Poortje was always up to point O, sheep being allowed to graze up to that point, although beyond it the owners of Poortje claimed no right of occupation. That being so there is no difficulty about this line, which now, in the opinion of the Court, ought to be recognised as the boundary line between Nauga and Matjeskloof. Then in the absence of any corner beacon to divide Nauga from Tafelberg the Court must give effect to the diagram so far as possible. Undoubtedly there is an overlap, and the principle is that where there is an overlap without any beacons to assist the Court the older grant must prevail. As between the farms Tafelberg and Nauga, the older grant is undoubtedly Nauga, and according to the diagram, clearly explained by Mr. Changuion, the corner beacon ought to be at S. But seeing that even if the point S is taken, that would necessitate the cutting off of a portion of the farm Poortje and also a small portion of the farm Matjeskloof, it is difficnlt to fix on S. It is, however, of importance that the Court should give a definite point as the corner beacon. Therefore the Court can only do the next best thing, and go up as near to S as possible. Accordingly I am of opinion that the Court ought to declare the boundary-line to be a line extending from A O to a point where it would be joined by the line C S, S being taken as the beacon which was placed by Mr. Changuion. The Court will therefore declare the proper boundary to be the line A O, extended to where the line would run from C to S, and from the junction to the oint C. But the plaintiff has claimed in his declaration that C X and X A be declared the boundaries, and on the other hand the owner of Tafel erg has claimed that C N and N O be declared his boundaries. The owners of Poortje and Matjeskloof have claimed that O A be declared the boundary. So far the Court agrees with them. But the owners of Matjeskloof have gone further and have claimed the right of occupation of N A O. They admit that it must be given to Nauga, but claim the right of occupation and also a prescriptive right to use a certain spring in the neighbourhood, and upon that point the owners of Matjeskloof have failed. It is quite true that Mr. Schreiner, when the case came into court, withdrew that claim, but he did not withdraw it before the case came into court, and it was therefore necessary for the plaintiff to come with evidence to show that there was no prescription. In my opinion this was as important a point to the owners of Nauga as any other point, because N A O would be useless to them if the others were entitled to the occupation of the land and also to the use of the spring. In this case the difficulty arises as to costs. The owners of Poortje succeed altogether and get everything they want, but then the owners of Poortje are also the owners of Matjeskloof, and under the circumstances we are of opinion that the most equitable course with regard to the case would be to allow each party to bear its own costs, except that the costs of Poortje ought to be borne by the plaintiff. The only manner in which that could be done is to order the plaintiff to pay one-third of the expenses of defendants' witnesses. Therefore, the judgment of the Court will be that the boundaries be as stated, and that each of the parties pay his own costs, except that plaintiff shall pay one-third of the total expenses of defendants' witnesses.

In reply to a question by Mr. Schreiner, the Chief Justice said that the references in the judgment were with regard to annexure B, Changuion's plan.

Buchanan, J. concurred, and said that early in the hearing of the case he had formed the opinion that beacon O would have to be given as a beacon of Poortje. The only difficulty that he had had was as to whether there was a beacon N, and he was now satisfied that if any beacon existed there at all it was only a line beacon.

Maasdorp, J., also concurred.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendants' Attorneys, Messrs. Findlay & Tait; Government Attorneys, Messrs. J. & H. Reid & Nephew.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

WHITE, RYAN AND CO. v. CHARLES EDWARD TATTERSALL.

1898. May 31st.

Mr. Gardiner applied for compulsory sequestration of the defendant's estate. The order was granted.

TREDGOLD, MCINTYRE AND BISSET v. C. VAN RHYN.

Mr. Jones asked for provisional sentence on a bond for £400.

Granted.

WHITE, RYAN AND CO. v. COETZE.

Mr. Buchanan applied for provisional sentence on a promissory note for £366, and interest from the 15th May, 1898, and costs.

Granted.

LITHMAN AND CO. v. HENDRICK HANSON.

Mr. Buchanan applied under Rule 329 for judgment for £22 15s. 4d. for goods supplied and costs of suit, and also for provisional sentence on two promissory notes respectively for £120 7s. 9d. and £197 2s. 10d. for value received. He asked for interest on the notes from the 7th April and 7th May respectively with costs.

Granted.

THE MASTER v. BREDEL.

Mr. Sheil, Q.C., appeared for the Master and said the defendant was summoned for the sum of £500, and he asked for judgment with costs.

Granted.

CREWS v. ZWEIGENHAFT.

1898. May 31st.

Provisional sentence—Purchase price of land—Misrepresentation by auctioneer.

The Court refused to grant provisional sentence on a summons claiming the purchase price of certain land which had been sold by public auction, the auctioneer representing that the land was near Retreat Station, whereas as a fact it was four miles distant.

Mr. Buchanan applied for provisional sentence for the amount of the purchase price of certain land, together with interest at the rate of 6 per cent. The plaintiff tendered the transfer of the property on the conditions of the sale being carried out.

The defendant appeared in person, and said the land which he bought was not what it was represented to be by the auctioneer. When he bought the land it was on the representation by the auctioneer that it was near the Retreat Station, but since then he had ascertained that it was situated on the Sandvlei, about four miles from the station. The sale of land took place on the Exchange, Cape Town, and a plan was exhibited showing the position of the ground.

De Villiers, C.J.: When did you discover that the land was four miles from the station?

Defendant: I asked the owner where the land was, and he said he did not know. I then made inquiries, and found that the owner bought the land on the statement that it was near Sandvlei, and he afterwards sold it as being near Retreat Station. When I bought it I was told by the auctioneer that it was freehold, and afterwards I found that it was quitrent land.

De Villiers C.J.: If it is true that the auctioneer represented the land to be near Retreat Station, and now it appears that it was near Sandvlei, the plaintiff can not get provisional sentence.

The defendant was then sworn and repeated on oath the statement which he had previously made, adding that he was quite sure that the auctioneer, Mr. Behr, said it was freehold.

Cross-examined: He said he did not consider that four miles from the station was near to it. He understood that the land was about ten yards from the station. He was in a position to pay for the land, and he was not trying to get out of the purchase because he was not in a position to pay for it.

Provisional sentence was refused and the parties ordered to go into the principal case. Costs to stand over.

BAILEY V. ANTH.

Mr. Currey applied for provisional sentence on a mortgage bond for £200. The defendant had been sued by edictal citation.

Granted.

LOUW V. MATTHEW AND THORPE.

Mr. Close applied for judgment for £260 7s. 1d., less £75 paid on account.

Granted.

LITHMAN AND CO. V. BREDA.

Mr. Buchanan applied for judgment under Rule 329 for £100 10s. 5d.

Granted.

MCKILLOP V. HENRY PETER HANSON.

Mr. Buchanan applied for judgment under Rule 329 for £400, being the purchase price of certain land.

Granted.

BENJAMIN V. BLAKE.

Mr. De Waal applied for judgment under Rule 329 for £25, being the balance of an account.

Granted.

DIEP RIVER SYNDICATE V. F. HAYWARD.

Mr. De Waal applied for judgment for £163, the purchase price of certain plots of ground, sold by the plaintiff in November, 1896.

Granted.

HARE V. J. C. HARRIS.

Mr. Jones asked for judgment, under Rule 329, for £32 10s. for bricks supplied and money lent, less £10 paid since the summons was issued.

Granted.

MARTELL AND CO. V. MARTELL AND OTHERS.

Mr. Molteno moved for judgment in an action for infringement of patent rights and damages. The defendants had signed a consent paper, and had given a power of attorney to Messrs. Scanlen & Syfret to sign judgment against them, and he moved for judgment in terms of that consent paper.

As the consent paper had not been signed, the application was postponed.

IN THE INSOLVENT ESTATE OF C. E. TATTERSALL.

Mr. Gardiner applied for the appointment of a provisional trustee.

The order was granted, and Mr. E. R. Syfret appointed.

KAYE V. KAYE.

1898.
May 31st.

Divorce—Evidence—Photographs.

This was an action for divorce brought by Arthur Kaye, of Woodstock, against his wife, Lottie Kaye, on the ground of her adultery with one Clayton.

Mr. Buchanan appeared for the plaintiff.

Plaintiff said he and his wife were married in England in 1895, and soon afterwards he went back to India, leaving his wife in England. Soon afterwards he returned to England, and eighteen months later he and his wife sailed for South Africa in the Tintagel Castle, on which Clayton was also a passenger. Clayton and his wife had not known each other before. He did not notice any familiarity between them, and he thought they were nothing but good friends. On arrival at Cape Town he and his wife stopped at the Masonic Hotel, but Clayton did not stop there. On the 21st January he (plaintiff) went to Tokai in search of work, and on returning in the evening he found that his wife had left and had taken all her luggage. Two or three days afterwards he heard that his wife and Clayton had gone to Worcester, and in consequence of this information he went to Worcester, only to find that they had left on the previous day for Johannesburg. He had since received two letters from his wife, both from Johannesburg. In one of these she made an offer on behalf of herself and Mr. Clayton to take and keep his (plaintiff's) baby. and stated that she would look very well after it. In the same letter she stated that she wanted her bicycle, or the value of it (£23), and if it was not sent she would claim the value of it in the court. Afterwards, he received another letter from his wife, asking for the custody of both children, and stating that she would never return to his home again. She also asked him to get a divorce as soon as possible.

By De Villiers, C.J.: He did not answer these letters. He had his two children with him at Woodstock. He was not working anywhere at present, but he had private means. He did not think Clayton had any occupation, but his (plaintiff's) wife had £3,000. His two children were two years and one year old respectively, and he wanted to have the custody of them, as he intended to take them back to his own people in England.

By Buchanan, J.: He had no quarrel with his wife, and there was nothing to lead him to suppose that she was going away.

Michael Conroy, proprietor of the Commercial Hotel, Worcester, said he remembered the plaintiff visiting his hotel about the 26th January last. Previous to that a lady and gentleman had stayed at his hotel under the names of Mr. and Mrs. Clayton. They shared the same room, and Mr. Clayton said they were newly married, and had just arrived from England.

A photograph of a coach full of passengers was put in, and witness recognised one as the lady who went under the name of Mrs. Clayton. The couple left the hotel the day before the plaintiff arrived, and they said they were going to Bulawayo.

De Villiers, C.J.: It is very dangerous to allow photographs alone to be taken as evidence, especially when they are on such a small scale as the one just put in. However, Mr. Conroy is perfectly satisfied that this is a photograph of the lady who went as the wife of Mr. Clayton, and who slept with him at Worcester, and the plaintiff also says that this is a photograph of the lady to whom he was married. If the evidence of the photograph stood alone, there would be a difficulty, but there is confirmatory evidence sufficient to justify the Court in granting the decree asked for. Amongst this confirmatory evidence is the fact that the defendant, in writing to the plaintiff, made an offer on behalf of both Mr. Clayton and herself. There is also proof of personal service. Under these circumstances the decree will be granted, with costs. The plaintiff will have the custody of the children.

[Plaintiff's Attorney, Gus. Trollip.]

DE VRIES V. DE VRIES. { 1898. May 31st.

This was an action for divorce brought by Mrs. Eliza de Vries against her husband, Peter de Vries.

The parties were married at Wynberg in 1882, in community of property, and the plaintiff alleged the adultery of defendant with Gertrude Gooda. She asked for the custody of the two children, aged twelve and fifteen years, and that the defendant should forfeit all benefits under the community of property.

Plaintiff said her husband was a blacksmith when she married him. They lived happily together for a short time, about twelve months, but their happiness was spoiled by the drunkenness of her husband, who began to ill-treat her. Her father brought him before the Magistrate at Wynberg, and he received a fortnight's imprisonment. Afterwards he went to Malmesbury, and she had not seen him since. At present she was living with one of her brothers. She wished to have the custody of the children, and as she had recently inherited some property from her father she was able to provide for them.

Martinus Broomfield said he had known the parties for several years. The defendant was now living with a woman named Gertrude Gooda at Malmesbury, and he believed they had had two or three children.

The Chief Justice said that was quite sufficient evidence. The decree would be granted.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

BETHANIE V. BETHANIE. { 1898. May 31st.

This was an action for judicial separation brought by Alice Mary Bethanie against her husband Christian Bethanie.

Mr. Currey appeared for the plaintiff.

The Rev. Mr. Botha proved the marriage of the parties in Cape Town in 1892. He said the woman had often complained to him of the drunkenness and ill-treatment of her husband, and he had spoken to him about it, but he always denied it. He was not able to judge which was in the right. He had never seen the defendant drunk.

Plaintiff said that soon after their marriage defendant took to drink and ill-treated her. She had to go out to work as a domestic servant because her husband would not give her sufficient to maintain herself and the children. Since 1895 she had lived with her father. On one occasion the defendant struck her and kicked the little boy. Since her marriage her husband had on an average allowed her 15s. a week. but he had given her nothing since the 6th of March. She asked for the custody of the children, and also for an order on her husband to pay £3 a month for her maintenance.

By De Villiers, C.J.: Her husband was a labourer and earned about 21s. a week.

Richard Foster, father of the plaintiff, said the defendant frequently came home drunk and abused his daughter and the children.

An order for judicial separation was granted, with an order on the defendant to pay £2 10s. a month until the youngest child was sixteen years of age, and afterwards £1 a month.

[Plaintiff's Attorneys, Messrs. Scanlen & Syfret.]

WEBER V. WEBER.

This was an action for restitution of conjugal rights, brought by Mrs. Mary Ann Florence Weber against her husband, Ernest Frederick William Weber.

Mr. Molteno appeared for the plaintiff.

The plaintiff's evidence, taken on commission, showed that the parties were married at Burghersdorp in 1894. They lived there for some time, and then went to Barkly East, but afterwards returned to Krugersdorp. At that time her husband was out of employment, and he went to Queen's Town in search of work. She had never seen him since. He was still at Queen's Town.

An order was granted called on the defendant to receive or return to his wife by the 15th of July, failing which an application for divorce could be made to the Court on the 1st August.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SCHOOMBIE V. OLIVIER. { 1898. May 31st.

Mutual will—Massing of part of estate — Legacy — Condition—Life interest— Codicil —Construction.

Husband and wife by their mutual will instituted each other and their respective children as their heirs and directed that the survivor should pay out to such heirs on majority the portions due to them. By a codicil they made the following provision: "We sell the farm L to our sons for £500. The abovementioned £500 shall be paid to our daughters after the death of the survivor."

Held *that the sons were not entitled on the death of the testator to claim the whole or part of the farm on giving security for the £500 but that according to the true construction of the codicil the testatrix was entitled to retain a life interest in the whole farm and only after her death can the sons claim the farm subject to the payment by them of the provision made for the daughters.*

This was an action for the transfer of certain property.

The plaintiffs' declaration was as follows:

1. The plaintiffs are Jan Albertus Schoombie, Jacobus Nicolaas Schoombie, and Hans Jacob Schoombie, who reside in the district of Wodehouse. The first defendant is Dina Margaretha Olivier (born Beukes).

widow of the late Andries Godlieb Schoombie, and now married in community of property to Cornelis H. Olivier, and by him duly assisted as far as need be in this action. The said defendant is sued both in her capacity as executrix testamentary in the estate of her late husband, the said Andries Godlieb Schoombie, and also in her personal capacity; the second defendant is the said Cornelis H. Olivier, who is sued personally.

2. On or about May 19, 1864, the late Andries Godlieb Schoombie, who was married in community of property to the first defendant, and is hereinafter called the testator, executed with her a mutual will, a translation whereof is hereunto annexed, marked A.

3. Prior to his marriage with the said defendant the testator was married to one Dorothea Maria Elizabeth Henning, and had two children, named Gerbreg Levina and Johanna Magdalena, by the said marriage.

4. By the marriage of the testator with the said defendant there were six children, to wit, the plaintiffs and two sons named Andries Albertus and Pieter Hendrik, and one daughter, Elsie Jusena.

5. Under the said mutual will the testator appointed the said defendant, together with his children by the first and second marriage, to be his sole heirs, and the testatrix appointed the testator and the children born of her marriage with him to be her heirs.

6. It was further provided by the said will that the survivor should, within six weeks after the death of the first dying, frame an inventory of the estate of the first dying, and have the said estate valued, the survivor to remain in full possession of the joint estate, and to pay over to the children their inheritances as they became of age or married, and the survivor was appointed executor.

7. On or about June 8, 1881, the testator and the said defendant executed a codicil to the said will, whereby they jointly bequeathed to their five sons aforementioned their farm Lafkrans, on condition that the sum of £500 be paid by the said sons to the three daughters aforementioned, after the death of the survivor. A translation of the said codicil is hereunto annexed, marked B.

8. On or about August, 1881, the testator died, and thereafter the testatrix married the second defendant, and has ever since remained in possession of the said farm Lafkrans.

9. After the testator's death the said sons Andries Albertus and Pieter Hendrik died intestate, being minors and unmarried.

10. Upon the testator's death the first defendant took out letters of administration as executrix, adiated under the said will, took over the movable property in the estate at a valuation, and paid the debts, and after payment of the said debts there was a small balance for distribution accruing from the movable property, as will be shown from the liquidation account filed with the Master of this Honourable Court, to which plaintiffs crave leave to refer when produced.

11. The defendants reside upon the said farm Lafkrans, and have had the use and occupation of the same from the date of the testator's death.

12. The plaintiffs are all majors, and they have demanded from the first defendant transfer of their shares in the said farm bequeathed to them, but the said defendant refuses to comply with the said request; and both defendants refuse to give up possession of the said farm to the plaintiffs.

13. The plaintiffs contend that they each became entitled upon attaining majority to possession and transfer of one-fifth of the said farm, and that they, together with their sisters aforesaid, are further entitled to half of the two-fifths of the said farm which devolved upon their brothers (now deceased), the first defendant being entitled to the other fifth, and they are willing, and have tendered to secure to their three sisters the payment of the sum of £100 each after the said defendant's death, by passing mortgage bonds upon their shares of the said farm.

14. The plaintiffs have sustained damages in the sum of £250 by reason of the defendants having wrongfully and unlawfully remained in possession of the said farm since they (the plaintiffs) attained majority.

The plaintiffs claim:

(*a*) That the first defendant in her capacity as executrix be ordered to transfer to them each one-fifth share of the said farm Lafkrans, they tendering each to pass a bond upon the said share for the sum of £100, to secure the payment of their several portions of the said sum of £500 to their three sisters upon the said defendant's death.

(*b*) That the said defendant in her said capacity be ordered to transfer to them, jointly with their said sisters, one-half of the two-fifths share of the said farm which accrued to their deceased brothers ; or that they be declared entitled, jointly with their said sisters, to such one-fifth share upon passing a mortgage bond to secure the payment of the proportionate sum reserved for their sisters at the death of the said defendant.

(*c*) The sum of £250 as damages, &c.

Annexure A.

To all who may see this public act or who may hear it read, be it known :

That on this ninth day of May, in the year of our Lord one thousand eight hundred and sixty-four, appeared before subscribed witnesses present by special request, Mr. Andries Gotlieb Schoombie and Mrs. Dina Margaretha Beukes, married persons residing on the farm Tigerhoek, in the division of Aliwal North, known to us the witnesses to be sound in body, in possession of their intellectual faculties, senses, and powers of articulation, and using the same, as appeared at the passing of these presents, who declared that they wished and had resolved to dispose of the property to be left at their death, and doing this (as they the testators asserted) of their own free will, without advice or persuasion of any one, annulling, accordingly, all testaments, codicils, and all other testamentary acts which they may have executed and passed jointly or separately before the date of these presents, consequently not wishing nor desiring that all or any of them shall be of the least force or effect after the passing of these presents, but on the contrary shall be considered as never passed.

And to nominate and appoint as his universal heir (1) his wife, the testatrix herein (2), his children procreated in the first marriage with his late deceased wife, Dorothea Maria Elizabeth Henning, named (1) Gerbreg Levina and (2) Johanna Magdalena, together with such child or children as have already been procreated in this his second marriage, or may still be procreated, of all the property which he may leave, movable as well as immovable, effects and credits, legacies and inheritances, nothing whatsoever excepted, to be possessed by his aforesaid heirs, and on the predecease of one or more of them by their lawful descendants by representation for ever as their free and own property, without contradiction of anyone.

The testatrix also disposing of the property to be left at her death, declared hereby to bequeath to and to nominate and appoint as her universal heirs (1) her husband, the testator herein, together with such child or children as have already been procreated in this her marriage, or may still be procreated, of all the property to be left at her death, movable as well as immovable, effects and credit, legacies and inheritances, nothing whatsoever excepted, to be for ever possessed by her aforesaid heirs, and on the predecease of one or more of them by their lawful descendants by representation, without contradiction of anyone.

And in order to find the portions of their heirs they desire and hereby declare that six weeks after the death of one of them an inventory shall be made of their estate, and that it shall be valued by two good and blameless men, and be liquidated in this manner, the survivor, however, remaining in full and undisturbed possession of the estate in order that the minors may be better educated and maintained by the usufruct of their portions till their majority, marriage, or other approved estates, when to each of them their portion shall be paid out.

The testators further declared to hereby nominate and appoint as their executors testamentary administrators of their estate, and guardians of their minor heirs, the survivor, with power of assumption, substitution, and surrogation, and with the express will and desire that the said executors shall not be obliged and bound to file with the Master of the Supreme Court or with any magistrate an account and inventory of their estate.

Lastly.—The testators declared expressly to reserve to themselves the power and right at all times to alter this their last will (with exception of the institution of heirs), and consequently to add thereto or to take therefrom what they may deem advisable either by separate act or at the foot of this testament, desiring that all such alterations which shall be found so made and under their own signatures shall be considered as if verbally inserted herein.

All the abovewritten having been read to the testators word for word, they declared to have well comprehended and understood the same, and this to be their testament and last will, desiring that it shall be held valid and have effect as such, either as solemn testament, codicil, *donatio mortis causa*, or as may best consist with law, notwithstanding some solemnities may have been omitted which the testators hereby hold inserted, imploring the utmost benefit of the law.

Annexure B.

We, the testators, further declare that we sell the farm Lafkranz, in the district of Wodehouse, to our five (5) sons, Jan Albertus, Andries Albertus, Jacobus Nicolaas, Hans Jacob, and Pieter Hendrik Schoombie, for the sum of five hundred pounds sterling (£500). The above-mentioned five hundred pounds sterling shall be paid to Gerbreg Levina and Johanna Magdalena Schoombie and Elsie Jusena Schoombie after the death of the survivor.

The defendants in their plea admitted the allegations in paragraphs 1, 2, 3, 4, 8, 9, 11, and 12, save that they said the dates of the will and of the testator's death were respectively the 9th May and the 12th August, and that the testator's daughter Elsie Susanna died intestate and a minor after her father in 1889. As to paragraphs 5, 6, and 7, they referred for greater certainty to the originals of the will and codicil. As to paragraph 10, they admitted the taking out of the letters of administration and the adiation and the acceptance of the benefit conferred by the codicil, namely, the benefit of usufruct of the testator's half-share of the farm Lafkranz. They said further that the first defendant took over the greater portion of the movable property of the joint estate at a valuation, and from time to time paid or settled all the debts, including a sum of £600 due as the balance of the purchase price of Lafkranz. Save as aforesaid they denied paragraph 10, and also paragraphs 13 and 14. They said specially that a massing was effected with regard to the said farm by the codicil, and a disposition thereof after the death of the survivor, and that the defendants had lawfully had and enjoyed, and were still enjoying, the usufruct of the farm in accordance with the true intent of the testator, who executed the said codicil a few days before his death, and they specially denied that the plaintiffs were now entitled to claim possession or transfer of any portion of the said farm during their mother's lifetime. Alternatively, should the Court hold that the first defendant was not so entitled to the benefit of usufruct of the said farm as aforesaid, they contended that she was entitled to one-half of the said farm by virtue of her marriage to her said husband with community of goods, and to be repaid the half of the deficiency in the joint estate advanced by her from time to time to pay or settle the debts of the same as aforesaid.

The replication admitted the correction as to the dates and that Elsie died intestate and a minor in 1889, but was otherwise general.

Mr. Searle, Q.C. (with him Mr. Buchanan), appeared for the plaintiffs.

Mr. Schreiner, Q.C. (with him Mr. Currey), appeared for the defendants.

The original of the codicil being put in, it appeared that the phrase, which was translated, "After the death of the survivor," commenced with a capital letter, and was separated by a space from the previous words, "Elsie Jusena Schoombie," thus having the appearance of a fresh and detached sentence.

Without any evidence having been adduced, Mr. Searle was called upon to argue the case for the plaintiffs.

Mr. Searle: The will and codicil must be read together. *Board of Executors and Greaver* v. *Morgan and Others* (G. 6, p. 25). The property passes at the death of the testator; the will does not say at the death of the survivor. The £500 has to be paid at the death of the survivor. A mutual will being the will of each testator, half of the property at least should pass at the death of the first-dying. If it was intended that the bequest should be postponed as well as the payment much stronger words should have been used.

Mr. Schreiner was not called upon.

De Villiers, C.J.: By the will the testator appointed as his heirs, his wife and his children, and the testatrix appointed as her heirs her husband and her children, and the testators directed that the survivor should pay out to the heirs of the first-dying on their attaining majority the portions of inheritance found to be due to them. The two estates were thus treated as separate and distinct and, although there was only one testamentary instrument, there were really two wills, dealing separately with the estates of the husband and wife respectively. The codicil, however, deals with the farm Lafkrantz as a whole, and not as forming separate parts of the two estates respectively. The codicil is divided into three separate paragraphs and reads as follows: "We the testators further declare that we sell the farm Lafkrantz in the district of Wodehouse to our five sons for the sum of £500. The above £500 shall be paid to Gerbreg, Johanna, and Elsie Schoombie. After the death of the survivor." This amounts to a bequest to the sons subject to the condition that, on the death of the survivor, they shall pay to the testator's daughters the sum of £500. The question is when does that bequest take effect. The plaintiffs in their declaration say that the whole farm had to be transferred to the sons upon the death of the testator on their giving security for the payment of £500 to the daughters, but the plaintiffs' counsel admitted that until the death of the defendant, who is the survivor, they cannot claim more than a half, less a child's portion. But why should they be entitled to any portion of the farm before their mother's death? I could have understood her setting up the defence that, as the will does not consolidate the joint property into a mass for the purpose of a joint disposition on the death of the survivor, she is not bound by the provisions of the codicil and can claim one-half of the farm as her own. The reply to such a defence would no doubt have been that so far as the farm is concerned the shares of the testators are consolidated by the codicil for the purpose of a joint disposition of the whole farm after the death of the survivor and that the codicil should be read as part of the will. It is unnecessary now to decide whether such a reply would have been conclusive, seeing that it is the sons. and not the surviving widow, who object to her retaining a life interest in the farm in lieu of the ownership of one-half. Her contention is that the real intention of herself and the testator, in making the codicil, was to give the survivor a life interest in the farm, and to bequeath it on the death of the survivor to the sons subject to the condition of paying £500 for the benefit of the daughters. Mr. Searle now admits that it was not the intention of the testators to give the whole farm to the sons on the death of the first-dying, and the terms of the codicil make it perfectly clear that they did not intend to bequeath part of the farms on the death of the first-dying and the remaining part on the death of the survivor. The conclusion is obvious that they intended the bequest of the whole farm to take effect on the death of the survivor, which is also the event upon the happening of which the portions for the daughters become payable. It follows that during her life time the defendant is entitled to the use and occupation of the farm. The judgment of the Court must therefore be for the defendant with costs.

Buchanan, J.: I concur. I think that the testator's intention as expressed in the codicil was that the words "after the death of the survivor" should apply to the whole bequest, and not be limited to the payment of the money.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné: Defendant's Attorneys, Messrs. Walker & Jacobsohn.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

MARTELL AND CO. V. EDMOND MARTELL AND CO. AND HANSEN AND SCHRADER. 1898. June 1st.

This was an application for leave to sign judgment in favour of the plaintiffs in terms of a certain consent paper.

Mr. Innes, Q.C. (with whom was Mr. Molteno), for the plaintiffs; the defendants did not enter an appearance.

The plaintiff, Edward Martell, trading as Martell & Co. prayed in this declaration:

1. That the first-named defendants may be restrained from carrying on business in this colony as brandy merchants either by themselves or though the second-named defendants under the firm or style of Edmond Martell & Co. or under any firm or style so clearly resembling the plaintiff's trade name as to be calculated to lead the public to believe that the business carried on by the defendants is the plaintiff's business, or any firm or style containing the word Martell, without adding thereto a statement clearly distinguishing the defendants' business from the plaintiff's.

2. That the second-named defendants be restrained from advertising themselves as the agents for South Africa for Messrs. Edmond Martell & Co. for the sale of Messrs. Edmond Martell & Co's brandies and be restrained from selling brandy as the brandy of Edmond Martell & Co.

3. That the defendants may be restrained from using the label marked B on bottles of brandy sold by them in any way in connection with the brandy business carried on by them.

4. £2,000 damages and costs.

Since the action had been instituted the following document had been signed by the plaintiff and the first named defendants, Edmond Martell & Co.—The pending actions in the Supreme Court of the Cape of Good Hope and in the Courts of Victoria and New South Wales between the above named to be settled in the following manner:

The plaintiff Edward Martell to have forthwith judgment for him against the defendants Sangé and Edmond Martell, and the other defendants in the several actions, for all injunctions claimed in the several actions in the terms claimed in the Cape action in the plaintiff's declaration and in the terms claimed in the Australian actions in the several writs issued, the plaintiff to forego all claims to the damage claimed in the actions, the defendants in the several actions to bear their own costs and the defendants Sangé and Edmond Martell to pay the plaintiff Edward Martell one half of all his costs in the several actions including those of and incident to the commissions issued from the Cape Court. Such costs to be taxed and ascertained in accordance with English law and the laws of the said three English colonies respectively. The defendants' claim in reconvention or counter-claim to be dismissed. Plaintiff agrees to carry out the above terms on his own behalf.

The defendants M. M. Sangé and Martell agree on their behalf and that of their agents who are co-defendants in the actions to carry out the above terms. The said defendants moreover in furtherance of the above agreement are to give irrevocable powers of attorney to the plaintiffs solicitors at the Cape and in Victoria and New South Wales to enable them to give the consent required to the judgments and to carry out these terms will instruct their own agents and solicitors in the above English Colonies to do everything required to carry out these terms. Mr. Edward Martell will give similar instructions. This agreement shall not affect or alter the binding force of the judgment of the Court of Appeal of Bordeaux delivered on December 29th, 1897, in a suit wherein Mr. Edward Martell was plaintiff and Messrs. Edmond Martell and Jules Sangé were defendants.

In terms of the above agreement the first-named defendant had appointed Messrs. Scanlen & Syfret to consent to and sign judgment in accordance with it and generally to do all things needful for the purpose of carrying it out.

A consent proper signed by Messrs. Scanlen & Syfret as plaintiff's attorneys was now put in, the consent being to judgment in terms of prayers 1, 2 and 3 of the declaration, and to the claim in re-convention being dismissed. Sangé and Edmond Martell to pay half of all plaintiff's costs. Messrs. Van Zyl & Buissinné, the defendants' attorneys, declined to execute the consent paper. They contended that the documents executed in France were quite sufficient and they did not dispute the settlement.

Mr. Innes said he could not press for judgment against the second-named defendants, as they had not signed the consent paper.

The Court granted judgment against the first-named defendants in terms of the consent paper.

[Plaintiff's Attorneys, Messrs. Scanlan & Syfret.]

IN THE MATTER OF THE CO-OPERATIVE BAKING SOCIETY, IN LIQUIDATION.

Mr. Buchanan presented the report of the official liquidator, and moved for its confirmation.

The usual order was granted.

IN THE MATTER OF THE ALIWAL NORTH BOARD OF EXECUTORS, IN LIQUIDATION.

Mr. Molteno presented a supplementary final report of the official liquidator, showing that the balance of £1,556 had been duly distributed among the shareholders.

The report was confirmed, and an order made that the company should be dissolved and the books destroyed.

IN THE MATTER OF THE PETITION OF GEORGE CHARLES BRISLEY.

Mr. Searle, Q.C., appeared for the petitioner, and moved that the rule *nisi* be made absolute. The matter had been before the Court on May 2, and allowed to stand over until to-day in order that the respondents might file affidavits. No appearance since had been made for the respondents, and no affidavits filed.

The order was granted.

IN THE ESTATE OF THE LATE ARTHUR WARREN.

Mr. Jones applied on behalf of the widow of the late Arthur Warren, executrix testamentary in estate, for leave to sell the share of the estate in certain property in Kimberley for the sum of £100. The property had been left to the petitioner in trust for the children of the marriage. The Master's report was in favour of the petition being granted.

The order was granted in terms of the Master's report, the proceeds of the sale to be invested subject to the Master's approval.

KAFFOOR v. KAISER.

1898.
June 1st.
,, 14th.
Aug. 1st.

Power of Attorney—Magistrate's Court—Appearance—Act 20 of 1856, Sch. B. Rule 13.

K. *upon his departure from the Colony left a "special power of attorney" by which he purported to appoint* A. *"as my lawful attorney and agent, in my name, place, and stead, to the Resident Magistrate's Court to appear and then and there, as my act and deed and generally, for effecting the purposes aforesaid, to do or cause to be done, whatsoever shall be requisite," etc., without stating for what purposes or in what actions* A. *should appear.*

Held, *that this power was too vague to entitle A. to appear in the Magistrate's Court of Cape Town to defend an action for ejectment instituted against* K. *in his absence.*

This was an application on notice calling on the respondent to show cause why an order for ejectment granted by the Assistant Resident Magistrate of Cape Town on the 10th May, should not be set aside. It appeared that the applicant Kaffoor hired certain premises at the corner of Hanover and Vandeleur streets from Kaiser. Kaffoor had gone on a pilgrimage to Mecca, but left a general power of attorney with one Abdullah Khan. The respondent, plaintiff in the Court below, brought an action for ejectment against the applicant, defendant in the Court below, and Khan, by endorsement on the power-of-attorney, appointed Mr. W. B. Shaw in his place.

The power was in the following terms:

Special Power-of-Attorney.

I, the undersigned, Gaffoor Ghattay, do hereby nominate, constitute, and appoint Abdullah Khan with power of substitution to be my lawful attorney and agent, in my name, place, and stead to the Resident Magistrate's Court to appear and then and there, as my act and deed and generally, for effecting the purposes aforesaid, to do, or cause to be done, whatever shall be requisite, as fully or effectually, to all intents and purposes as I might or could do, if personally present and acting therein; hereby ratifying, allowing, and confirming, and promising and agreeing to ratify, allow and confirm, all and whatever my said attorney shall lawfully do or cause to be done, by virtue of these presents.

Given under my hand at Cape Town this 20th day of November, 1897. In the presence of the undersigned witnesses.

(Signed) GAFFOOR GHATTAY.

As witnesses,
G. N. EMS.

On the back was the following endorsement.

"I, Abdoola Khan, hereby nominate and substitute Mr. W. B. Shaw to act in the premises by virtue of the powers of substitution herein contained.

A. KHAN.

Cape Town,
May 8th, 1898.

Shaw appeared and excepted to the jurisdiction on the ground that the defendant had a lease of the property which was above the value of £40 to him. An objection was then taken to Shaw appearing for the defendant on the ground that the power-of-attorney was vague and insufficient.

This objection was upheld and Shaw was not allowed to appear.

Evidence was given for the plaintiff and the Magistrate granted a decree of ejectment.

Notice of this application was then given to the plaintiff.

It was stated on affidavit by Mr. Shaw that he believed Kaffoor was on his way to South Africa and was expected to arrive in Cape Town in June.

Mr. Searle, Q.C., appeared for the applicant.

Mr. Buchanan for the respondent.

Mr. Buchanan: The procedure is irregular; the matter should be brought up on review.

[De Villiers, C.J.: Why should you press this objection? What have you to gain by it?]

On review we would have the record of the Court below and the Magistrate's reasons.

Mr. Searle: The authorities show that in cases of this kind the procedure should be in the nature of a *mandamus. Brown* v. *Hudson* (1869 p. 170). The proceedings there were exactly similar to those now instituted. *Randiess* v. *Truter N.O. and Van Schalkwyk* (G. 3 p. 451).

[Buchanan, J.: There a *mandamus* was asked for; but here you do not ask for one.]

[De Villiers, C.J.: If the objection is pressed it is quite competent for us to order the issue of a summons, but there would be all the paraphernalia of a summons without a corresponding advantage to the respondent.]

Mr. Searle: In *Cronje* v. *Halse and Hudson* (1869 p. 170), a judgment had been given, so that it was identical with this case, and the same course was followed.

Mr. Buchanan withdrew his objection and the affidavits were then read.

Mr Searle: Either the applicant could not have been summoned or if summoned he should be allowed to appear. If he is away it is questionable whether the Magistrate could make an order of ejectment against him. Rule 13 of the Magistrate's Court is in the following terms: It shall be permitted to any plaintiff or defendant to appear and conduct his case by means of any person authorised by writing under his hand, to be filed with the clerk of the Court; and when it shall be made to appear to the satisfaction of the Court that by reason of the absence from home of any defendant such written authority could not be obtained, then it shall be permitted to any one of his family or any one having a general authority to manage his affairs in his absence and willing to conduct the said case to appear for the defendant and conduct the same. It was proved to the Magistrate that he was away and a written power was put in. Even if that had not been done Abdulla Kahn as the general agent of the applicant was entitled to appoint an agent.

Mr. Buchanan: The objection taken to the power was that it was vague and insufficient. That raised two points: first, that it was not genuine, and second, that it was not capable of giving authority to Shaw to appear.

[De Villiers, C.J.: A defendant who is forced into Court, in distinction from a plaintiff, is allowed a certain amount of latitude.]

The power should, in any case, be properly framed. If there were no appearance at all the defendant would, under Rule 28, be allowed to appear a month after execution. *Gabb and Fraser* v. *Greenshields* (7, Sheil p. 488.)

Mr. Searle: If the Court should hold that there was sufficient authority to appear then the Magistrate should have tried the case and satisfied himself as to whether or not there was a lease.

Mr. Buchanan undertaking that the order of ejectment would not be carried out until judgment was given the Court reserved judgment until the Magistrate had sent in his reasons.

Postea (14th June.)

The Court intimated that the Magistrate's reasons had been received. The Magistrate stated:—"The power does not say in which Magistrate's Court Mr. Shaw is to appear nor for what purpose: the space for the purpose being left blank in the form of power-of-attorney. I held that the object for which the power was granted was not stated at all. I did not go into the question of the signatures to the power."

By consent a stay of execution was ordered and judgment postponed until the 30th June, to give the applicant an opportunity of appearing and re-opening the case.

Postea (August 1st.)

Mr. Schreiner, Q.C., for the applicant, applied for judgment: The applicant had not yet returned from Mecca. Abdoole Khan had given a fresh power-of-attorney to Mr. Shaw under which application was made on the 5th July, to the Magistrate to re-open the case; the application was heard on the 25th and refused on the ground that no fresh evidence had been produced. An appeal was noted and execution stayed until the 4th August.

Mr. Schreiner: The power is quite good. It is marked "Special" and is intended to be a power to act in all Magistrates' Courts; it is dated in Cape Town and therefore, is meant to apply at any rate to the Magistrate's Court of Cape Town. It does not specify in what actions Khan was to appear but the applicant probably did not know what proceedings might be taken against him in his absence. He could not himself dispute Khan's authority. I cannot say he is a person having a general power to manage *all* the applicant's affairs but he has a power to manage all his affairs in the Magistrate's Court.

De Villiers, C.J.: The power of attorney does not state the purpose for which it was granted, and the Magistrate held that it was too vague in its meaning for him to accept it as a power of attorney. In my opinion, the Magistrate was quite right. When the matter was before the Court previously I thought the same, but as Mr. Shaw had stated that the applicant was expected in a month's time, the Court thought it better to postpone the matter, so that the applicant might re-appear and re-open the case, when the merits of the case could have been gone into. Up to the present, however, the applicant has not reappeared. It is stated that he has been detained for sanitary reasons at Mecca, but if that be so there ought to be some letter or telegram put in to show it. Under the circumstances, the Court must refuse the original application with costs, and also refuse the present application.

Buchanan and Maasdorp. J.J., concurred.

[Applicant's Attorney, D. Tennant; Respondent's Attorney, J. Ayliff.]

WARNER V. WARNER. 1898. June 1st.

Contempt of Court—Divorce proceedings Custody of children—Rule *nisi*.

This was an application on notice for the committal of respondent for contempt of Court, owing to her non-compliance with an order of the Court made on March 2 last. On that date the petitioner, Henry William Warner, plaintiff in the action, obtained a decree of divorce against his wife, Amy Jane Warner. The Court also made an order that the plaintiff was to have the custody of the three eldest children of the marriage on condition that before claiming such custody he should pay into the hands of the Master of the Supreme Court the sum of £200, to be devoted to the payment of the school expenses of the three children. Plaintiff had complied with that order, and a receipt was produced from the Master for the £200. He had made arrangements for the children to be received into the Zonnebloem College, and was anxious to have them removed from their present surroundings. The respondent, however, had not complied with the order of the Court, and had not delivered up the children. The delay was causing loss to the petitioner, as he was anxious to proceed up-country in search of work. Notice had been given of the present application to respondent's attorneys, but the latter had informed petitioner's attorneys that they could do nothing with the respondent, and that they had served notice of the application upon her.

Mr. Buchanan appeared for the petitioner.

The Chief Justice said: The defendant is very ill-advised in not complying with the order of the Court, and the Court may have to proceed to extremities if she persists in her refusal, and may have to adopt forcible measures to take the children away from her. At present, the Court will grant a rule calling upon the defendant to show cause by June 13 why she should not be committed for contempt of court for refusing to deliver up the children, this rule to be served on her personally.

TRUSTEE OF STOREY V. DU PREEZ. 1898. June 1st.

Condictio indebit—Payment of debt—Payment of insolvent.

An insolvent paid the attorney employed by him to surrender the estate the sum of £6 and the attorney gave a receipt for the amount "on account of costs of surrender." Afterwards the trustee paid to the attorney his taxed bill of costs in ignorance of the fact that the bill had already been paid in part.

Held, *reversing the decision of the Resident Magistrate of Cape Town that, whether the insolvent paid the money out of his salary or not, the trustee was entitled by way of* condictio indebiti *to recover back the sum which had been accepted by the attorney as part of his bill.*

This was an appeal from a decision of the Assistant Resident Magistrate of Cape Town, in an action in which the appellant sued the respondent, an attorney of the Court, for the recovery of £6. The appellant was trustee in the insolvent estate of Charles Storey, and as such paid Du Preez the sum of £10 6s. 6d. in settlement of a "bill of costs for fees and disbursements due in the matter of the surrender of the estate." He afterwards discovered that the insolvent had paid defendant £6 on account of costs *re* surrender of the estate. Respondent alleged that Storey had paid this amount to him out of his earnings as a clerk after he became insolvent, and that it was not for the work for which he had been paid by the trustee in the estate, but was for other work after the insolvency, and for costs as between attorney and client. It was also stated that of the £6 one guinea had been given to the trustee to induce him to take up the trusteeship in the estate, otherwise he would not have done so, as the estate was such a small one. The Magistrate gave judgment for the defendant on the ground that the money had not vested in the estate, being the personal earnings of the insolvent.

Mr. Buchanan for the appellant.

The receipt given for this money shows that it was paid for the costs of surrender of the estate. The insolvent's evidence is also to this effect.

[De Villiers, C.J.: The real point is whether the money has been paid.]

Mr. Molteno, for the respondent: It seems that Du Preez spent a good deal of time trying to arrange a composition. The trustee, moreover, had to be paid to take the office and there were numerous consultations in the matter.

De Villiers, C.J.: The Magistrate appears to me to have missed the real point of the case. The question was not whether the money paid to the defendant by the insolvent was the insolvent's own money free from the control of the trustee but whether, after the money had been so paid on account of the costs of the surrender, the defendant ought not to have deducted it from the bill of costs charged by him to the plaintiff as the trustee of the insolvent estate. The defendant received from the insolvent the sum of £6 "on account," as the receipt states, "of costs *re* surrender of estate." Thereafter the defendant presented to the plaintiff a "bill of costs for fees and disbursements due in the matter of the surrender" of the same estate, amounting to £10 6s. 6d. The defendant paid the amount but I am satisfied that, if he had been informed, as he ought to have been, that £6 had been paid on account, he would have paid only the balance of £4 6s. 6d. The full sum was paid in ignorance of the fact that £6 had been paid on account and therefore, if the payment of £6 was a good payment, the plaintiff is clearly entitled to recover back the over payment by means of the *condictio indebiti*. It cannot be said that, because the insolvent paid the £6 out of his own funds, there was no discharge *pro tanto* of the debt owing by the trustee, for by our law a debt may be discharged by a stranger. In the present case it was only a discharge in part but it was accepted as such by the defendant and is, therefore, binding upon him. The appeal must, therefore, be allowed with costs and judgment entered for the plaintiff with costs in the Court below.

Buchanan and Maasdorp, J.J., concurred.

[Appellant's Attorney, J. Ayliff; Respondent's Attorney, H. P. Du Preez.]

SUPREME COURT

[Before the Right Hon. SIR J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

DELPONTE v. DELPONTE. { 1898. June 2nd.

This was an action for judicial separation instituted by Mrs. Caroline Delponte (born Riegelhuth) against her husband, Gaetano Delponte, on the grounds of his cruelty.

The declaration alleged that the parties resided in Cape Town, where they were lawfully married with community of goods on the 22nd April, 1879.

That there had been born of the marriage ten children, of whom eight, namely, three girls and five boys, were still living.

That since their marriage, from time to time, but especially during recent years, and with particular reference to February, 1895, January to May, 1897, and February, 1898, the defendant wrongfully, unlawfully, and cruelly conducted himself towards the plaintiff by committing violent assaults upon her person, by excluding her from her bedroom, by refusing her conjugal rights, by abusing her with vile and violent language, and by otherwise treating her with cruelty, contumely, and contempt in her home, and elsewhere, in the presence of servants, strangers, or her children, by which intolerable conduct and acts the plaintiff was on more than one occasion driven to seek recourse to this honourable Court; but abandoned her intended or commenced actions upon promises of reform, which have been broken by the defendant.

By reason of the premises, the plaintiff prayed for:

(*a*) A decree of judicial separation *a mensa et thoro*.

(*b*) An order conferring upon her the custody of the children of the marriage, and compelling the defendant to pay and contribute during their minority such sum as shall be decreed towards their support, maintenance, and education.

(*c*) An order directing a division of the joint estate, and appointing a receiver to effect such division, other relief, and costs of suit.

The defendant in his plea admitted the marriage, and that on one occasion in or about the month of February, 1898, under circumstances of great provocation given to him by the plaintiff, he slapped her face twice, owing to the use by her of violent and filthy language towards him in the presence of their children, when throwing a cup and saucer at him, and threatening him with a knife.

He alleged that the plaintiff had a violent temper, and had frequently during the last ten years made use of abusive, violent, and bad language towards him in the presence of their children and otherwise, and had incited and influenced the said children against him, that she was extravagant in her habits so that he had been obliged to stop tradesmen from giving her credit.

He admitted that the plaintiff had commenced legal proceedings against him previously, but denied that she had good cause for doing so. He said that she had on more than one occasion, after leaving him of her own accord, returned and requested him to take her back, whereupon he took her back to live with him.

He denied that the plaintiff had any right to claim the relief asked for, or any portion thereof, but he said that he was willing, and hereby offered, in view of the facts above set forth, to consent to an order of judicial separation *a mensa et thoro*, under the following conditions :

(*a*) That the whole estate remain in his hands to be administered by him.

(*b*) That he pay the plaintiff the sum of £60 per year as and for alimony, in such instalments as this honourable Court may direct.

(*c*) That the children remain for the present with the defendant, the plaintiff having access to them at all reasonable times and places.

(*d*) That he pay the sum of £120 a year to such person as this honourable Court may appoint for the maintenance and education of the children, such sum to be paid in such instalments as may be directed by this honourable Court.

Subject to the above, he prayed that the plaintiff's claim might be dismissed.

The plaintiff in her replication admitted that she had at times, but only when the defendant provoked her thereto, used strong language to him, and that on one occasion she took up a knife in order to defend herself if necessary against the personal violence threatened by the defendant.

The remainder of the replication was general, and on these pleadings issue was joined.

Mr. Rose-Innes, Q.C., and Mr. Sheil, Q.C., appeared for the plaintiff.

Mr. Searle, Q.C., and Mr. McGregor for the defendant.

Mr. Innes said that as both parties were desirous of a separation the only point at issue was the division of the estate.

Mr. Searle said the question was almost entirely one of property, and suggested that some person should be appointed to make a report upon the assets and liabilities of the estate and bring it up. He made this suggestion in the hope that they might be able to avoid going into all the evidence. Both parties desired a decree of judicial separation, and the defendant was still willing to renew an offer which was made some time ago, namely, to give to the plaintiff certain landed property and stock in Cape Town, including a music warehouse. It would be easy to show that this was considerably more than half the estate. Under that arrangement the plaintiff could keep the children. This offer was made on the condition that the plaintiff would neither sell nor mortgage the property until the youngest child was of age.

Mr. Innes said the plaintiff's position was simply that she wanted half the estate, and this was nothing like half.

De Villiers, C.J.: If you get a clear half who would keep the children ?

Mr. Innes replied that the plaintiff desired to keep the children, but felt that the defendant should pay half the amount of their maintenance.

Mr. Searle suggested that a gentleman in the position of Mr. Steytler should be appointed to prepare and report on the estate. He did not think either party desired to wind up the business.

De Villiers, C.J.: Is the father willing to keep the children ?

Mr. Searle replied in the affirmative.

De Villiers, C.J.: This is the order which we propose, subject to suggestion or amendment. By consent to grant a judicial separation with costs, that Mr. Steytler be appointed to inquire into the assets and liabilities of the estate, to see how the estate could be best divided between the parties, to ascertain the wishes of the children as to their custody, and how much should be allowed for their maintenance, the defendant undertaking that there should be no alienation of the property, pending the presentation of the report, without the consent of Mr. Steytler. I hope that Mr. Steytler will be able to take up the matter at once, as it is no use allowing it to hang over longer than is necessary.

Postea (June 13).

De Villiers, C.J., stated that Mr. Steytler had filed his report on the division of the property in the estate of Delponte, and asked whether counsel wished to be heard before an order was made.

Mr. Innes, Q.C., said the parties had not been able to come to an agreement.

Mr. McGregor said the defendant was quite willing to agree to the terms of Mr. Steytler's report, which assigned certain property to the plaintiff on the one condition that she should not alienate any of the property until the youngest child had reached the age of sixteen if a boy, and eighteen if a girl.

De Villiers, C.J.: The judgment of the Court will be that the plaintiff should have the custody of the children, and the defendant to have access to them at all reasonable times; that the property be divided as follows: The Loop-street property to be transferred to the plaintiff, and that she retain as her share the music warehouse and all stock therein, but that she be prohibited from alienating any of the said landed property without the order of the Court, this order to be registered with the transfer of the property to the plaintiff; the defendant to retain all other property belonging to the joint estate, and to pay the debts: the defendant to pay also to plaintiff the sum of 15s. per month for each child in her custody, until the girls attained the age of eighteen and the boys sixteen; costs to come out of the estate with the exception of the costs incurred since the previous hearing which should be borne equally by the parties.

[Plaintiff's Attorney, C. C. Silberbauer; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

PEEK, FREAN AND CO. V. CARR AND CO. LIMITED. } 1898. June 3rd.

Trade Mark—Descriptive words—Act 12 of 1895.

The words "Café Noir" as applied to biscuits are not registrable as a trade mark, inasmuch as they are descriptive and do not in any respect satisfy the requirements of Act 12 of 1895, section 2.

This was an application by Messrs. Peek, Frean & Co. for an order for the rectification of the register of trade marks by removing the words "Café Noir," registered by the respondents as the trade mark of certain biscuits manufactured by them.

The grounds upon which the application was based were as follows:

First.—That the words "Café Noir" are descriptive of a certain kind of biscuit dealt in by the respondents.

Secondly.—That the same words were berore the registration of the said trade mark publicly used to describe a certain kind of biscuit sold by the applicants in this colony and elsewhere.

An affidavit filed in support of the application alleged that the applicants had since the early part of February, 1897, used the words "Café Noir" as descriptive of a certain class of biscuit manufactured and sold by them numbers of which had been exported to this colony and Natal, the boxes containing the same having upon them the said words "Café Noir," the said biscuits being so described because of their having a flavour of coffee. Correspondence between the parties was referred to, in which the respondents admitted that their registration in the Colony was dated 21st April, 1897, and in Natal, 14th October, 1897. The respondents also stated that in claiming the exclusive right to the use of the expression "Café Noir" as applied to biscuits they did not claim the reference to coffee in any shape or form, and that other manufacturers were quite at liberty to sell coffee rusks or coffee biscuits so long as they refrained from selling under the fancy name "Café Noir." The affidavit of Charles Haith alleged that he had been the representative of the respondents in South Africa since October, 1894, and to the best of his knowledge and belief there were no biscuits sold in South Africa under the style of "Café Noir" until January, 1895. Then and for some time afterwards the respondents continued to ship "Café Noir" biscuits largely to South Africa, and he believed that they were the only biscuits imported under that name until the applicants began to ship biscuits so called in February, 1897. With reference to the term being descriptive, he said he had tasted the biscuits and was unable to find any flavour of coffee in them. The affidavit of the clerk to respondent's attorneys showed that the respondents' application for registration of their trade mark was filed with the Registrar of Deeds on the 26th February, 1897.

Mr. Innes, Q.C. (with him Mr. Schreiner Q.C.), for the applicants: The respondents claim to register on the ground that these two words constitute a fancy word. But under the present Act, Act 12 of 1895, that is no qualification, though it was a qualification under Act 27 of 1891. As to what is meant by a fancy word, see *Sebastian on Trade Marks* (3rd edition, pp. 44, 45).

The only other ground is that it is an invented word. But "Café Noir" is simply two French words having a perfectly clear meaning. An invented word must be a word having no meaning to ordinary English people or having no meaning as a trade mark. *In re Van Durer* (34, Ch.D., p. 623); *Sebastian* (p. 78). The exclusive use of foreign words employed in their ordinary signification will not be protected in England any more than that of an ordinary English adjective. "Black Coffee" could not be registered merely because they were translated into French.

[De Villiers, C.J.: Have the respondents registered "Café Noir" in England?]

They do not say so and that is significant.

Sebastian (p. 47), as to invented words, says "the introduction of this expression into the Act appears to be intended to bring within its scope and to render registrable as new marks such words as "Washerine" and "Monobrut," which were rejected as fancy words, or as "Pectorine," "Lactopeptine" and "Valvoline." "Satinine" was held to be a descriptive word and not registrable as applied to starch, soap and blue. *In re Meyerstein & Co.* (43 Ch.D., p. 604); "Somatose" was held to be not registrable as being descriptive and not invented. *In re Farbenfabriken Application* (Ch.D., 1894, Vol. I., p. 645). "Café Noir" conveys to the ordinary person either a particular flavour or a particular time for use; therefore it is descriptive of the character or quality of the biscuit. *Sebastian* (p. 625) says: "In a series of cases registration has been refused on the ground that the term claimed, if properly applicable to the goods with respect to which it was used was descriptive, but if not, was deceptive, *e.g.*, "American Sardines," "Egg Macaroni." The same objection applies to "Café Noir."

Mr. Searle, Q.C., for the respondents: The only grounds on which the words can be registered are that they are not descriptive. They do not form an invented word and fancy words cannot now be registered. The general principles are laid down by *Sebastian* at pp. 59, 62; "Bovril" was held not to be descriptive. *In re Trade Mark, No.* 58, 405 "Bovril" (Ch.D., 1896, Vol. II., p. 600), "Somatose" was decided to be non-registrable because it was stated on affidavit that it was intended to be used in connection with the body. Act 12 of 1895 enacts that the words must have "no reference to the character or quality of the goods." In this case the character or quality must mean something inherent in the biscuit. We disclaim any flavour of coffee: if the words refer to the time of use only that is not a reference to character or quality. *Sebastian* (p. 48) says that this class of marks seems designed to include such terms as "Pharaoh's Serpento" toys, "United Service" soap, and "Charter Oak" stoves. *Barnett* v. *Leuchars* (13 L.T.R. (N.S.), p. 495). If these words had been in Kafir they would have been registrable. In *Burgoyne's Trade Mark* (61 L.T., p. 39) it was held that "Oomvo," an Australian word meaning "Choice," could be registered as being meaningless to an ordinary Englishman. *In re Magnolia Metal Co.'s Trade Marks* (Ch.D., 1897, Vol. II., p. 371) it was held by the Court of Appeal that the word "Magnolia" had no reference to the character and quality of the goods, although the metal used had obtained the name of Magnolia. As to registration in England the respondents' local agent has no knowledge of it but we do not admit that we are not registered there.

De Villiers, C.J., said: The words "Café Noir" are French, but the ordinary Cape Colonist who would be likely to use biscuits such as these in question would know the meaning of these words. The words mean black coffee. To him the term Café Noir, as applied to biscuits, would convey the idea, either that these biscuits have the flavour of coffee, or that they are fit for use with coffee. If they had not either of these meanings, then clearly they would be deceptive. Now sub-section (*c*) of the second section of Act 12 of 1895 allows words to be registered having no reference to the character or quality of the goods, and not being a geographical name. If these words "Café Noir" were proposed to be registered as the trade mark of a carriage, for instance, they would be perfectly meaningless. They could not be held to be descriptive of the carriage, but if these self-same words are applied to an article of food, then at once they convey the idea that they have either the taste of coffee, or that they are fit to be used with coffee. In my opinion, therefore, the objection taken by the applicants is a good one. It is not necessary to discuss all the technical cases which have been referred to. The whole case lies in a nutshell, and, in my opinion, inasmuch as these words do have a reference to the character or quality of this particular biscuit, the registration must be expunged. The application must be granted with costs.

Buchanan and Maasdorp, J.J., concurred.

Mr. Searle asked the opinion of the Court as to whether the respondents could register the word "Noir" if they disclaimed the exclusive use of the word "Café."

De Villiers, C.J., said that raised another point.

Mr. Innes said this raised a new and important point, and he would submit that it would be a very awkward precedent if the Court gave an opinion on the point. The respondents should go before the Registrar.

[Applicants' Attorneys, Messrs. Tredgold, McIntyre & Bisset; Respondents' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

ADMISSION. { 1898. June 8th.

The Attorney-General (Mr. Graham, Q.C.) applied for the admission of Mr. Beauclerck Upington as an advocate of the Court.

The order was granted and the oath administered.

GLENNIE V. SCHWALBE. { 1898. June 8th.

Sale of house—Authority of broker to purchase.

This was an action for the purchase price of certain property in Mill-street, Cape Town, and 6 per cent. interest on that amount from April 15. The pleadings alleged that on January 27 last the plaintiff sold to the defendant, through Mr. P. J. O'Dowd, a certain house and the ground on which it was situated in Mill-street, Cape Town, for the sum of £1,250, it being further agreed in terms of the contract of purchase that transfer was to be taken on April 15, the purchaser to pay costs of transfer. The plaintiff alleged that his part of the contract had been duly carried out, and tender of transfer had been made. The defendant denied that he had ever authorised the said broker, P. J. O'Dowd, to make the purchase on his behalf, and that therefore he was not bound to take transfer of the property.

Mr. Benjamin (with whom was Mr. Buchanan) for the plaintiff.

Mr. Molteno for the defendant.

Patrick James O'Dowd, law agent and broker, carrying on business in Cape Town, said that about last December he had some negotiations with defendant as to the purchase of a house for him. Ultimately witness offered him plaintiff's house. Witness had heard casually that plaintiff's house was for sale, and subsequently saw the plaintiff, and got from him particulars as to the price of the house. Schwalbe and witness's clerk went to inspect the house, and on their return Schwalbe told witness that the house was larger than he thought, and authorised witness to offer £1,250 for it. Witness wrote the letter (produced) making the offer in defendant's presence. The latter knew what witness was writing about, but witness believed he did not go through the form of reading the letter over to defendant. At that date witness told defendant that plaintiff could not give transfer until April, and it was arranged, at any rate so far as defendant was concerned, that transfer should be given from the middle of April. Next day witness saw plaintiff, and the latter accepted the offer. On the evening of January 27 witness made out and despatched the broker's notes, one for the plaintiff and one for the defendant. The following morning witness found the broker's note he had sent to the defendant lying on his table, and from what he heard he expected defendant to visit him during that day. Afterwards witness saw the defendant along with Groman and another man. They wanted to get the sale cancelled, and endeavoured to get witness to see Glennie with that object. Witness refused, and Groman then said that Schwalbe could not take transfer, for he could not sell his house in St. John-street.

Cross-examined: Witness had had a previous transaction with defendant, in which a mistake had occurred through defendant giving witness the wrong number of a house, and afterwards the sale was cancelled.

Walter G. Glennie, the plaintiff, a clerk in the Civil Service, employed in the Customs Department, gave corroborative evidence as to defendant, together with the last witness's clerk, inspecting the house. Defendant complained about the house being too small, and witness explained how it could be enlarged. Defendant said it would be too small for his family, but that with the addition of two or three rooms it would be large enough. Witness told defendant the price was £1,350, but no sum was fixed on. The same day witness received the letter from Mr. O'Dowd making the offer. Later on the defendant came back again along with a gentleman named Groman. In the course of conversation Schwalbe said he was paying a high price for the house, but witness said the property was very cheap.

By the Court: After that visit witness considered the property sold. Witness understood that defendant's second visit was to show his new purchase to his brother-in-law (Groman). Defendant then seemed perfectly well satisfied with his bargain. It never occurred to witness to say that he had got the letter from O'Dowd.

Cross-examined: Witness got his broker's note on the morning of January 28. It had been delivered before that.

Re-examined: O'Dowd did not tell witness on January 28 about defendant returning his broker's note. Witness sent the key of the house to O'Dowd on the day on which transfer had to be given, because O'Dowd had been acting for defendant. Witness was not aware that the case had not been brought on during the May term, because it was desired to wait until Groman had gone to Europe. The house in question contained five rooms, bathroom, &c.

By the Court: Witness did not understand between January 28 and March 1 that the sale had been actually repudiated. He did not consider himself at liberty to sell the house; as a matter of fact he had been approached several times since with a view to selling it.

This concluded the case for the plaintiff.

For the defence,

Simon Schwalbe, the defendant, a tailor, residing in Plein-street, said that he returned from Somerset Strand on the morning of January 25, at ten o'clock, and between eleven and twelve o'clock he met O'Dowd, who said, "Schwalbe, I have got a splendid property which will just do for you and your family to live in. It is a large house, with nice grounds, and very reasonable, and you will never get a better bargain." O'Dowd could not tell witness the exact size of the house, but said it was large. Witness's income was about £200 a year. He told O'Dowd he would have to sell his property in St. John-street before he could buy another property. Witness was working all the remainder of that day, and it was the following day (January 26) before he went with O'Dowd's clerk to see the house. He saw at once that the house would not suit, and told O'Dowd's clerk so. He actually told Mr. Glennie that the house was too small to suit him, and no price was ever mentioned. Witness accompanied the clerk back to O'Dowd's office. Witness never authorised O'Dowd to make any offer, and never made any agreement to take possession on April 15. He never authorised the writing of a broker's note, and nothing was ever said about the purchase price. He went afterwards to see the place with Groman, but never gave Glennie to understand that he had made an offer. Groman also agreed that the house was too small. On the evening of January 27 a boy came to witness with the broker's note, but witness would not accept it, telling the boy he had not bought the house.

Cross-exemined : Witness was positive that it was on January 26 he went to see the house. Witness knew that if he returned the broker's note there was no sale.

Simon Schwalbe, a son of the defendant, gave corroborative evidence as to his father being busy in the shop on the afternoon of January 25 ; also as to his father going to see the house on the 26th, and the refusal to accept the broker's note on the evening of the 27th.

Annie Schwalbe, wife of the defendant, said that on Thursday, January 27, at four in the afternoon, a boy came to her with a broker's note. She refused to accept the note.

Redmond John Keaney said that last January he was a clerk in the employ of Mr. O'Dowd. About two in the afternoon of January 25 he took Mr. Schwalbe to the house in question. Witness waited for him outside. When they were returning defendant said that the rooms were a bit too small. He never said anything to lead witness to believe that he had concluded the sale.

After argument.

The Chief Justice said : The only question arising out of the present case is whether O'Dowd had authority from the defendant to make an offer of £1,250 for the house in question, upon the terms stated by Mr. O'Dowd. The question as to whether the contract of sale is evidenced by the existence of the broker's note is not of so much importance in this country as it would be in England, where in certain classes of sale the evidence of the contract must be in writing. Therefore in England in a case of this kind, the acceptance of the broker's note would be an essential of the plaintiff's claim. Apparently the defendant must have an intimate knowledge of the law in this respect, for he stated that when he saw it was a broker's note, he did not accept it because he was of opinion that if he did not accept the broker's note there would be no sale. The evidence as to whether authority was given to make the offer depends upon the conflicting testimony of O'Dowd and the defendant. O'Dowd was positive that it was on January 25, after the defendant came back with his (O'Dowd's) clerk that he saw defendant, and that the latter authorised him to make the offer of £1,250, and also stated that he was prepared to take transfer about the middle of April. O'Dowd there and then in the presence of defendant wrote this letter, although he says he could not say whether he showed it to defendant. Now, if this is the truth, something must have passed between them and some authority must have been given to O'Dowd to write the letter. Mr. O'Dowd writes as follows : "Mr. Schwalbe, who has seen your house, tells me to offer you £1,250 for it." and so on. If the defendant is to be believed, he came to O'Dowd's office simply for the purpose of saying that he did not want the house at all. and then we are to believe that O'Dowd on receiving this information sits down in the presence of the defendant and writes a letter saying that the defendant will take the house. The evidence of the defendant upon the face of it seems to me almost incredible. When we come to go into the matter of the date, we find that the whole of the evidence supports Mr. O'Dowd's statement that all this took place on January 25. His letter-book shows that it was the last letter written on that day, and this could not have been a mistake ; the letter could not have been written on the 26th and wrongly dated the 25th, for the letter-book shows that there were several letters written on the 26th, but this one comes before them, and it was a letter that must have been written late in the day, the transaction having taken place in the afternoon. I have therefore come to the conclusion that this conversation did take place on the date mentioned. This view is supported by the evidence of the clerk, who has been called on behalf of the defendant. I take it that O'Dowd was authorised to make this offer on January 25, and that on the 26th the plaintiff informed O'Dowd that he accepted the offer and that the terms were arranged, the transfer to be taken on April 15, in accordance with the authority given by the defendant. I am quite prepared to agree that if before this final acceptance the defendant had wished to withdraw it was quite competent for him to do so, but it was too late after the acceptance had been notified to him by the broker's note. If he could have withdrawn then the result would have been that O'Dowd might have been held personally liable by the plaintiff. That shows the justice of the rule, that after authority had been given to O'Dowd to make this offer the defendant should be held liable for performing his part of it. My attention has been drawn to the letter of January 28, which O'Dowd wrote to the defendant after he had returned the broker's note. In this letter O'Dowd states that defendant had instructed him to make the offer to Mr. Glennie. and says defendant simply states in refusing the note that he (defendant) and Mr. Groman would see him (O'Dowd). There has been no answer to this letter from defendant, and defendant and Mr. Groman did not go and see O'Dowd. For these reasons I think the plaintiff must succeed in the present case. Judgment must be given for the plaintiff with costs.

Buchanan and Maasdorp, J.J., concurred.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

ADMISSIONS.

1898.
June 13th.

On the application of Mr. Close, Mr. Norman MacRobert was admitted as an attorney and notary.

On the application of Mr. Close, Mr. James Bruce Cleghorn was admitted as a conveyancer.

PROVISIONAL ROLL.

MASTER V. RAWLINS.

Mr. Sheil, Q.C., asked for an order upon the defendant to file an account in the estate of which he was executor.

The usual order was granted.

KRAMER V. BLANCKENBERG.

Mr. Buchanan asked for an order of civil imprisonment against the defendant. Judgment had been given against him for £172, and a writ of execution was issued, but there were no goods to attach. The parties had come to an agreement by which the defendant was to pay £15 down, £15 a month from the 1st May to 1st October, and £20 a month after until the debt was settled. Only one amount of £15 had been paid since that arrangement was made.

The defendant appeared in person, and being sworn, said he had no means whatever. He was now working as a commission agent, and was living at Newlands. The debt was for forage which he sold to his brother at Kimberley, but he had not received the money for it, as his brother had become insolvent. When he offered the £15 a month he hoped that trade would improve, but it had been getting worse almost every day. He would pay £5 a month from the beginning of the present month, and would pay more later on if things improved.

A decree of civil imprisonment was granted, to be suspended on payment of £5 a month.

H. P. DU PLESSIS V. VAN ROOYEN.

Mr. Buchanan asked for provisional sentence with costs, and interest on a promissory note for £80.

Granted.

SWANEPOEL V. SWANEPOEL.

Mr. Jones moved for provisional sentence for the sum of £100 on a mortgage bond.

Granted. Property declared executable.

VAN DER BYL AND CO. V. HEINEMANN AND MILLER.

Mr. Currey asked for judgment, under Rule 329, for the sum of £44, for goods sold and delivered.

Granted.

VAN DER BYL AND CO. V. ROOS.

Mr. Maskew asked for judgment, under Rule 329, for £25, less £20, which had been paid on account.

Granted.

VAN DER BYL AND CO. V. TROUT.

Mr. Currey asked for judgment, under Rule 329, for £8 6s., for goods sold and delivered.

Granted.

ROWE V. T. W. SEALE AND C. J. SEALE.

Mr. Douglass applied for judgment, under Rule 329, for the sum of £125, due on account of goods sold and delivered.

Granted.

REHABILITATIONS.

On the application of Mr. Maskew and Mr. Buchanan, George Lotze, Coenraad Michiel Behr Conroy, and Marcus Friedman were rehabilitated.

Mr. Jones moved for the release from sequestration of the estate of Mary Jane Armstrong.

Granted.

Ex parte HELM.

Rehabilitation—Balance-sheet.

Notwithstanding the repeal of Acts 15 of 1859 and 15 of 1867, the rules of Court framed under the former Act which require an insolvent applying for rehabilitation to file a balance-sheet are still in force.

Mr. McGregor applied for the rehabilitation of an insolvent named William Anderson Helm, now living in the Orange Free State. The Registrar had not placed the matter upon the roll because he felt that all the formalities had not been complied with, as the balance-sheet required by the rules of Court had not been filed.

Mr. McGregor: The rules of Court which require a balance-sheet were framed under the Act 15 of 1859. That Act is now repealed, and the position of an insolvent before the passing of that Act is preserved as if that Act had not been passed. Act 15 of 1867 confirms the rules framed under Act 15 of 1859, but Act 35 of 1896, Schedule E, repeals the whole of Act 15 of 1867. The edition of Tennant's Rules of Court last issued does not mention those rules. *In re Cloete* (J. 4, p. 107), the insolvent had not filed a balance-sheet. *Van Zyl's Judicial Practice* (p. 643).

De Villiers, C.J.: The rules in question were in force before Act 15 of 1867. That Act gave them statutory force, but the repeal of that Act does not repeal the rules. They have effect by reason of the Charter of Justice.

The Court held that the balance-sheet was still required, and ordered the application to stand over to the 12th July, in order that it might be filed.

[Applicant's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

BIRD V. BIRD.

Mr. Close applied on behalf of the plaintiff for the direction of the Court as to what course should be followed in this case. The case had been specially set down for to-day, but service had not been strictly complied with according to the rules of the Court, and the Registrar had therefore refused to set the case down. The order of the Court was for personal citation, and everything had been done to effect personal service, but without success. Mrs. Bird was anxious to return to her parents in England. Under these exceptional circumstances counsel asked the Court to take her evidence now. The action was for divorce for malicious desertion.

De Villiers, C.J., said the case could not be set down for trial, but for the convenience of the plaintiff the Court would take her evidence.

Mrs. E. Bird, sworn, stated that she was the plaintiff, and was suing her husband for divorce on the ground of malicious desertion. They were married in England in 1890, and there was one child, a girl, aged five and a half. In 1895 they came to the Colony to settle in consequence of her health. Her husband was an electrical engineer. They came out with the best introductions, and her husband got work at the Docks at once. He kept that appointment for about six months, when he left because he was unpunctual. He got another appointment with Messrs. Findlay & Co. She had had a great deal of trouble with him. They disagreed on money matters and other things. She did not consider he was straight in money matters. He also drank. She had great difficulty in keeping the house together on the funds which he gave her. Her husband had a good position, but he did not always bring his money home. She supported herself by teaching and painting. In 1895 her husband went to an appointment in Johannesburg, and afterwards went to Pretoria and Beira, and from the latter place she received a telegram from him in which he promised to pay her £10 a month. She sent dozens of telegrams, but she never received any money. Finally she heard that he had gone to England, but she never heard from him or of him for two years. She saw him in Cape Town about Christmas last year. She saw him in the street with a number of men, but as she did not like the look of the men she did not speak to her husband. He afterwards ran after her, and asked her how she was, and told her that he was going up-country in two days. She told him that if he would not come back and support her and her child she would sue for a divorce. She had never seen him since, and she knew nothing whatever of his present whereabouts.

De Villiers, C.J.: If the applicant goes to England I suppose she would take her child with her, and she is asking for a decree of divorce with the custody of the child. Before asking for such an order plaintiff's advisers will have to consider whether it would be competent for the Court to grant such an order if she leaves the country.

Mr. Close said plaintiff was wthin the jurisdiction of the Court now.

De Villiers, C.J.: We cannot give an order yet. Due service will have to be given. It would be a case of two parties both out of the jurisdiction of the Court, and the Court could not grant a decree. I will not, however, argue the case, but will just point out these difficulties, so that they can be met when the trial comes on.

The case was set down for August 1.

GENERAL MOTIONS.

IN THE MATTER OF THE PETITION OF JOHN WILLIAM BROOKS AND OTHERS.

Mr. Gardiner applied for a rule *nisi* under the Derelict Lands Act to be made absolute.

Granted.

THE TORVA SYNDICATE v. KELLY.—THE TORVA SYNDICATE v. WHITE'S ESTATE.—THE TORVA SYNDICATE v. MOCKS.

1898.
June 13th.
,, 14th.
Aug. 18th.

Appeal.—Matabeleland Action—Security, *de restituendo.*

Security on appeal to the Privy Council ordered to be given to the satisfaction of the High Court of Matabeleland, the original action having been tried there.

These were three applications for leave to appeal to the Privy Council. In these three cases, which were taken together, Mr. Innes, Q.C., appeared for the applicants, and asked that execution might be stayed pending the appeal.

Mr. McGregor, for therespondent, asked that execution might issue, the respondents giving security *de restituendo.*

Mr. Innes argued the question as to whether the security required should not be security available within the jurisdiction of the Supreme Court, considering that it was an appeal from this court.

The Chief Justice: The writ of execution must be a writ of the High Court of Matabeleland, but as the writ *de restituendo* would have to issue from this court, the question of security is an important one, and we will take time to consider it. But leave to appeal will be given and execution allowed to issue.

Postea (June 14th).

De Villiers, C.J., said: We think the security in this matter should be given to the satisfaction of the High Court of Matabeleland. The order will be leave to appeal, granted without stay of execution, provided that the respondents should before execution of the judgment enter into good and sufficient security, to the satisfaction of the High Court of Matabeleland with the approval of this Court. Costs to be costs in the cause.

The Court further intimated that the proceedings in the matter should be through the Registrars of the two Courts.

Postea (Aug. 18th).

De Villiers, C.J., said: The learned judge of Matabeleland has fixed the security in this case subject to the approval of this Court. He left the question of costs of the application to be decided by this Court. The Court has given its approval and will order the costs to be costs in cause.

IN THE ESTATE OF THE LATE HENDRIK PETRUS JANSE VAN RENSBURG.

Mr. Buchanan applied for leave to raise a loan of £125 on certain property.

The Master had reported in favour of the petition.

The application was granted.

IN THE MATTER OF THE PETITION OF GEORGINA JACOMINA LOURENS.

Mr. Upington applied for leave to transfer certain property without the assistance of her husband.

The application was granted.

IN THE MATTER OF THE PETITION OF JACOBUS NICOLAAS BOSHOFF.

Mr. De Waal applied for the cancellation of a certain mortgage bond fraudulently passed by one Brink in his own favour upon property belonging to the applicant. Brink had been employed in collecting the rents, and in 1863 had passed the bond without the applicant's knowledge. He was now believed to be dead, and the bond could not be traced. The Court granted a rule *nisi*, calling on all persons concerned to show cause why the bond should not be cancelled. The rule to be returnable on the 1st August, and to be published in an English and also a Dutch paper in Cape Town, also in a Pretoria and a Bloemfontein paper. The petitioner was also ordered to make inquiries as to whether any heirs of Brink were still living, and to serve the order upon them.

Postea (Aug. 1st.)

The rule was made absolute.

IN THE ESTATE OF THE LATE AUGUSTA MEYER.

This was an application by the executrix of the late Augusta Meyer for an order authorising the Registrar of Deeds of King William's Town to transfer to two of the heirs of the testatrix certain property, known as the Railway Hotel, situated in lots 1 and 2, block E on portion of lot 3, and a sub-division of lot 8, block E, in the town of East London. The will of the testatrix bequeathed to the said heirs the Railway Hotel, situated in lots 1 and 2, block F, in the town of East London, but the petition and the affidavits filed in support of it showed that there was no Railway Hotel in block F, and that the testatrix had possessed no property in block F, whereas the Railway Hotel situated in block E did belong to her. It was believed that F was a clerical error, and that E was meant. The testatrix had left four children only, and the two who were not included in the bequest consented to the order prayed for being made.

Mr. Jones appeared for the petitioners.

The application was granted.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

DEKKER V. UNION BANK, IN LIQUIDATION.

1898.
June 14th.

Mr. McGregor applied for substituted service of the rule granted on the 12th May, (Supra, p. 149), as the attempt to serve Brazier personally had failed.

The Court ordered publication in a Free State paper, a Johannesburg paper, and a Bulawayo paper, and made the rule returnable on the 1st August.

Postea (August 1st).

Mr. McGregor stated to the Court that Brazier had been discovered and communicated with, and that after negotiations the applicant had agreed to pay him £30 as his share of the amount due by the liquidators. He consequently did not oppose the application.

The rule was made absolute.

HATHERELL AND OTHERS V. SPRIGG, N.O.

1898.
June 11th.

Act 32 of 1892, section 71—Court of Officers—Sentence — Announcement in open court.

H., *a private in the Cape Mounted Rifles, was tried for desertion before a Court of Officers and found guilty. He was informed of the verdict of the Court but was not informed at the time what sentence had been passed upon him, nor was any announcement of the sentence made in open court.* H. *was then removed to the public prison and there confined. The proceedings of the Court were then transmitted to the senior officer of the Colonial Forces in compliance with section 71 of Act 32 of 1892, and were confirmed by him ten days after the verdict had been announced. Seven days subsequently to this the sentence was announced to* H.

Held, *that there had been no such irregularity as would justify the quashing of the proceedings.*

This was an application on notice to the Right Honourable Sir J. G. Sprigg, K.C.M.G., Prime Minister of this colony and Ministerial Head of the Defence Department, for the issue of summonses under rule 190 ordering the production of the records of certain four prosecutions before a Board of Officers constituted under the Colonial Forces Act of 1892, and held at Kokstad on or about the 23rd April, 1898, with Captain Blaine as president, and wherein the applicant, Arthur Hatherell, and others, namely, Herbert Ball, Alfred Edward Robson, and Thomas Charles Jones Williams, privates in the Cape Mounted Rifles, were the accused, in order to have them corrected, with a view to the discharge of the applicants from imprisonment, in consequence of certain irregularities.

The applicants alleged that they were at present confined in Her Majesty's public prison in Kokstad, where they were undergoing hard labour.

That on the 23rd April, 1898, they were brought before a Board of officers of the Cape Mounted Riflemen charged with desertion, and were informed that they were guilty, but that no sentence whatever had been passed upon them.

That on the 9th May last they were removed under escort from the military guard-room to the public prison, where they were now confined.

Colonel Homan-ffolliott, senior officer of the Colonial forces, in an answering affidavit, alleged that under the provisions of the Colonial Forces Act 32 of 1892 all sentences and proceedings of ordinary Courts are required to be transmitted to the confirming authority for confirmation.

That the proceedings of the ordinary Court which tried the applicants were duly transmitted to him, and being in order were confirmed on the 3rd May last, and he was informed and believed that the sentence was read out to the prisoners on the 10th May.

That the applicants allege that there were certain irregularities in the proceedings of the Court by which they were tried, but they do not state what the irregularities consist of, and he had been unable to find any irregularities in the proceedings.

That in the affidavit of Edward Thomas Jones it was stated that no sentence whatever was passed upon the prisoners, inasmuch as the president stated that it would be necessary to forward the proceedings to a higher military authority for confirmation before awarding punishment.

That if this were one of the irregularities complained of, then he said that it was not the practice for an ordinary Court convened under the Colonial Forces Act to state in open court what the sentence was until the proceedings had been confirmed by the senior officer of the Colonial Forces.

Mr. Benjamin was heard in support of the application.

Mr. Sheil, Q.C., for the respondent.

Mr. Benjamin : I admit that the sentence was recorded at the time it was passed and subsequently confirmed. The irregularities complained of are, first, in not passing sentence in public, and secondly, in confining the applicants in an ordinary prison. I cannot support the latter objection. Act 32 of 1892, section 78.

As to the first ground, the sentence should be passed as in an ordinary tribunal. Charter of Justice, section 32 requires sentence to be passed in open Court. Also Act 20 of 1856, Schedule B, Rule 26. Section 63 of Act 32 of 1892 shows that only the deliberation on the sentence shall be in private. Section 84 requires that the sentence shall run from the date of award ; that shows the importance of its being announced in open court.

[De Villiers, C.J. : Was not the gaoler's warrant presented to you ?]

Only subsequently, when applicants' attorney wrote asking for his authority for their detention.

Mr. Sheil : Section 71 of the Act provides that a sentence shall not be valid until it has been confirmed by the senior officer. See also the form of oath taken by the officers who sit in the Court which is laid down in the regulations framed under the Act.

De Villiers, C.J. : This is an application for the issue of a summons under Rule 190 for the purpose of having the conviction of these men quashed on the ground of irregularity. There is only one irregularity urged, which consists in the statement that after the applicants had been convicted of the crime of desertion by a Court of officers the sentence of the Court was not immediately announced. It is admitted that the verdict was announced, but that the sentence was not immediately announced at the time when the applicants were sent to gaol. But the

71st section of the Act provides that a sentence shall not be valid until it has been confirmed by the responsible officer, and, consequently, it is impossible to hold that the Court was bound to announce a sentence which had not been confirmed. It only became valid upon being confirmed. It is stated that it was announced after confirmation, and when we refer to the warrant produced by the gaoler we find that the sentence is specifically mentioned there. In my opinion, this is not such an irregularity as would justify the Court in quashing the proceedings. It seems to me that the course pursued was in accordance with the general spirit of the Act. The application must be refused.

Mr. Sheil applied for costs on the ground that there was no need to bring the case into court at all.

The usual practice was to apply to the Registrar for summons.

No order was made as to costs.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné: Respondent's Attorneys, Messrs. J. & H. Reid & Nephew.]

ROAN AND MATHEWSON v. SPRIGG, N.O. { 1898. June 14th.

This was an application on notice to the Right Hon. Sir J. G. Sprigg, K.C.M.G., Prime Minister of the Colony and Minister in charge of the Defence Department, that the Court would be moved in terms of the applicants' petition, when the respondent would be required to show cause why the prayer of the petitioners should not be granted, and such order made regarding costs as to their lordships shall appear proper.

The petitioners alleged that they were at present confined in the guard-room or military prison at Kokstad, under what order or authority it was impossible to find out.

That on the 2nd September and 5th October, 1895, the respective petitioners enlisted in the C.M.R. to serve for a period of five years under the provisions of Colonial Forces Act 32 of 1 92, and the rules and regulations framed thereunder.

That according to Rule 47, it is stated that as an indulgence non-commissioned officers and men may obtain discharge from the regiment by purchase, subject to the pproval of Government upon payment money according to the scale thereto :tached.

That during December, 1897, the petitioners were members of F Squadron of the C.M.R., under the command of Captain Blaine, through whom petitioners applied in writing to purchase their discharge from the regiment, in accordance with the regulations already referred to under which they joined.

That in reply to petitioners' application they were informed by the adjutant of the regiment, through the captain of their squadron, that the applications had been duly approved of, and each of them was requested to forward the sum of £9 to purchase their discharges according to the regulations, which sum was duly forwarded, and the paymaster of the regiment in due course forwarded to Captain Blaine an acquittance therefor.

That the adjutant of the regiment thereupon informed the petitioners that their discharges were to take effect on the 15th February, 1898, to which petitioners agreed: thereupon they were authorised to dispose of their horses, saddlery, and equipments.

That the petitioners duly made all arrangements to leave Kokstad, and on the afternoon of the 14th February proceeded to the town, where they purchased the necessary civilian outfit, and upon returning to camp on the eve of their departure from Kokstad, were informed by Sergeant-Major Kennedy that their discharges had been revoked.

The petitioners thereupon proceeded to Captain Blaine, who, while expressing sorrow, stated that it would be necessary for the petitioners to commence again as recruits by going into debt for another horse, saddlery, clothing, and equipments, to which the petitioners demurred. That on the 15th February, 1898, according to agreement, petitioners' contract to serve in the C.M.R. terminated, and they therefore became civilians, and not amenable to the C.F. Act of 1892, the Government on their part (as they do at present) having retained the sum of £18 hereinbefore referred to.

That on the 16th February, 1898, the petitioners duly left Kokstad, but in Aliwal North on the 13th April, 1898, they were arrested without a warrant of apprehension upon a charge, so they were informed, of desertion from the C.M.R.

That on the 6th May the petitioners were brought under an armed escort before a Board of officers of the C.M.R., charged with desertion and found guilty.

The petitioners were subsequently informed that they had been sentenced to three months' hard labour, at the expiration of which they were to be dismissed from the C.M.R. after hearing which sentence the petitioners were marched under escort to the public prison under warrant, and were now undergoing hard labour in prison garb.

The prayer was that the gaolor of Kokstad might be ordered to liberate the petitioners.

Colonel Homan-ffolliott (senior officer of Colonial forces), in an answering affidavit, alleged:

That members of the C.M.R. are not entitled, as of right, to claim discharge from the force; but as an indulgence, non-commissioned officers and men may obtain discharge by purchase after three years' service, subject to the approval of Government.

That every application for a discharge must be submitted to the senior officer of the Colonial forces for approval of Government, and upon approval the discharge is signed by such senior officer.

That in the present instance the discharge of the applicants was refused on the ground that they had not served for three years.

That the senior officer of the Colonial forces is the proper person to convene ordinary Courts under the Colonial Forces Act 32 of 1892, and that as such senior officer he authorised an ordinary Court to be convened for the trial of the applicants on the charge of contravening section 11 of the second schedule of the said Act in having at Kokstad on or about the 16th February, 1898, deserted from the C.M.R.

That under the provisions of the said Act the sentences of an ordinary Court must be transmitted with the proceedings relating thereto to the senior officer of the Colonial forces for confirmation, and in the present case the proceedings were duly transmitted to him, and were found to be in order, and on the 20th May last he confirmed the same, but under the powers conferred upon him by the 76th section of the said Act he remitted the sentence of eighty-four days' imprisonment with hard labour.

That a telegram was sent by him on the same day, the 20th May, to Captain Hatton, the president of the ordinary Court, by whom the applicants were tried, authorising the release of the applicants, and he was informed and believed that they were released from custody on the 20th May, 1898.

He annexed a form of the oath taken by recruits upon enlistment in the C.M.R.

Under this oath recruits undertake to serve for a period of five years, and to conform to such rules and regulations as are in force, or may from time to time be promulgated, under Act 32 of 1892.

Mr. Benjamin was heard in support of the application.

Mr. Sheil, Q.C., for the respondent.

Mr. Sheil: These two men have been liberated, and this consequently is an application for an abortive order. The time of the Court should not be wasted by hearing the case.

Mr. Benjamin: It is true that the men have been liberated, but they want to have the conviction quashed. If the application is not wide enough to cover that, I ask for a summons under Rule of Court 190.

De Villiers, C.J. said: This is an application for the release of these men. It has been stated that the men have been already discharged. Therefore there is nothing for the Court to decide upon. If the applicants can produce any evidence of improper trial or imprisonment, and apply to have the conviction quashed, they must proceed in the ordinary way. On the present application no order can be made.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. J. & H. Reid & Nephew.]

IN THE ESTATE OF THE LATE WM. PIETER VAN BREDA.

Mr. Upington applied on behalf of Mrs. M. C. van Breda and G. W. Steytler, the executors, for leave to sell certain property, which had been purchased on behalf of the estate and transferred into the name of Mrs. Breda in trust for one of the heirs, a minor The petition stated that the transfer was not intended as a satisfaction of the minor's paternal inheritance, but was the outcome of a sudden thought that the land should be bought rather in the name of one of her children than herself. It was proposed to invest the proceeds in the purchase of another property in the name of that minor and his brother.

The Chief Justice said that instead of giving transfer to the estate, as the executors ought to have done, they transferred it to one son, and strangely enough, Mr. Steytler appeared to have consented. Why this was done is a mystery. The lady said it was a sudden thought, but Mr. Steytler ought to have restrained such a sudden thought. Now there is an application to undo what has been done. The Master has satisfied himself that these two sons will not get more than their due share of the property; on the contrary, he thinks they will get less. Under these circumstances this transfer to the two sons will be sanctioned without in any way approving of what has been done in the past with regard to the estate.

BURGER AND OTHERS V. DE VILLIERS.—*In re* VAN DER MERWE'S INSOLVENT ESTATE. { 1898. June 14th.

Insolvency – Ordinance 6 of 1843, Section 30- Voting.

A creditor who holds a general bond upon an insolvent estate is entitled to vote for the full amount of his claim upon a resolution dealing with the sale of all the assets in the estate.

This matter came before the Court by way of notice to the respondent that he would be expected to show cause, if any, why an order should not be granted declaring him as one of the creditors of the estate not entitled to vote for the full amount of his claim in connection with the general administration of the estate, but only in respect of the difference between the amount of his full claim and the value he sets upon the security held by him in respect of a certain general bond, and further, that the resolution proposed and seconded by the respondent on behalf of certain creditors, and carried, be set aside, and the resolution proposed and seconded by William Parke Cressey, on behalf of certain other creditors, be declared as carried, and why the respondent should not pay the. costs of the application. The estate was sequestrated on 1st February last, and at the second meeting, held on the 2nd March, Cressey, representing three creditors entitled to vote, proved claims amounting to £465 15s. 11d., and the respondent, representing, twelve creditors, including himself of whom only three were entitled to vote, proved claims amounting to £534 5s. 1d., both being candidates for the appointment of trustee. Neither, however, having a clear majority in number and value, the Supreme Court on the 12th April last appointed Mr. G. W. Steytler provisional trustee, with full power to liquidate the estate.

On the 25th May last the third meeting of creditors was held, when the respondent, under power of attorney from Mr. Steytler and as representing certain creditors, proposed and seconded a resolution that the assets of the estate should be sold by public auction, and that he should be the auctioneer.

Mr. Cressey, representing other creditors, proposed and seconded a resolution that he should be the auctioneer.

He further objected to the respondent voting on the resolutions for the full amount of his claim, £404 (£400 secured on general bond), and contended that he should only be allowed to vote for the balance, if any, after deducting the value of the preferent lien or security held by him as declared in his proof of debt in terms of section 30 of Ordinance 6 of 1843.

The Resident Magistrate, before whom the meeting was held, ruled that the respondent could vote on the full amount of his claim, "as the assets in the estate are such property over which his bond gives security." He consequently declared the resolution proposed by the respondent, Mr De Villiers, carried.

Mr. Steytler filed an affidavit in which he alleged, *inter alia*, that he was administering the estate, and realising the assets by public auction in the usual and customary manner, and that he had appointed the respondent auctioneer to hold the sale.

Mr. Currey was heard in support of the application.

Mr. Sheil, Q.C., for the respondent.

Mr. Currey: Ordinance 6 of 1843, section 30, requires the respondent to put a value on his security, and after deducting such value from his debt allows him to vote only as a creditor for the balance, except in the election of "trustees and commissioners, and in all matters regarding the property over which he shall have such security or lien."

[De Villiers, C.J.: By virtue of his bond the respondent holds a preferable security over the whole of the assets. That was settled in *Hare* v. *Heath's Trustee* (J. 8., p. 32).]

Hay v. *Savage and Hill* (E.D. 4, p. 242) appears to be in point.

[De Villiers, C.J.: If this bond had been a bond over land, could he not vote as to whether advice should be taken as to whether it should be sold?]

I submit not. If the Magistrate's decision is correct he will not take any advice.

Mr. Sheil was not called upon.

De Villiers, C.J., said: The only question is whether a person who holds a general bond over the insolvent's property is entitled to vote upon a question which affects the disposal of that property. The whole question involved in this motion affects the property over which this bond exists. It was expressly decided in the case of *Hare* v. *Heath's Trustee* that a general bond does give the holder a preferable security over concurrent creditors. Now, the 30th section of the Insolvent Ordinance provides that "any creditor who shall hold a preferable security upon any part of the insolvent estate shall have the right to vote for trustees and commissioners and in all matters regarding the property over which he shall have such security, both in number and value, for the full and entire amount of his debt." The application must be refused, with costs. The case of *Hay* v. *Savage and Hill* does not apply to this case.

[Applicants' Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorneys, Paul de Villiers.]

IN THE ESTATE OF THE LATE BAREND BARTHOLOMEUS JUZA BURGER.

Mr. Upington applied for leave to sell certain property in which minors were interested.

Granted.

IN THE MATTER OF THE MINOR JOHANNES ALBERTUS BOTHA.

Mr. Close applied for the appointment of a *curator ad litem* for the purpose of a subdivision of property.

Granted. Mr. E. du Toit appointed.

IN THE ESTATE OF THE LATE ELIZ. CATHERINE JOHANNA VENTER.

Mr. Close applied for leave to sell certain property and purchase other property.

Granted, with the condition that the property purchased shall be held on the same conditions as that to be sold.

IN THE MATTER OF THE MINORS GORDON.

Mr. Buchanan applied for authority for the payment of an amount sufficient for the minors' maintenance and education out of the capital sums standing to the minors' credit in the hands of the Malmesbury Board of Executors. *Vide 7 Sheil* (pp. 318, 388). The Master's report was in favour of granting the application.

Mr. Sheil appeared for Mrs. De Kock, one of the heirs of the late Mr. Van der Walt, who had originally paid the money in question into the Malmesbury Board of Executors in trust for the minors. He asked that the Court would make no order which would bind the property, as an action might be necessary to determine the validity of the gifts.

An order was granted in terms of the Master's report.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

RICHMOND V. MORGAN CROFTON.

1898.
June 15th.
„ 21st.

Act 15 of 1856, section 1—Master and Servant—Contract in writing.

R. *entered into a contract with* C. *in England whereby she agreed to serve* C. *as part kitchen and housemaid for one year from date of arrival at the Cape of Good Hope. This contract was reduced to writing and signed by* R. *but not by* C.

Held, *not to be a contract in writing in terms of Act 15 of 1856, section 1.*

This was an appeal from a sentence passed upon the appellant by the Resident Magistrate of Wynberg on the 18th May, 1898.

The appellant, Isabella Richmond, was charged by her master, Colonel Morgan Crofton, with contravening Act 18 of 1873, clause 2, section 7, in that upon or about the 23rd day of April, 1898, the said Isabella Richmond did wrongfully and unlawfully, without leave or lawful cause, absent herself from the premises of her master at Newlands, or other place proper and appointed for the performance of her work, at Newlands aforesaid.

The accused pleaded not guilty.

The evidence of the complainant went to show that the accused came out from England under a guarantee to enter his service for twelve months, and that after she had been in his service for two months she left without leave and contrary to his wish.

For the defence, the following evidence was called:

Mary McConville (sworn) stated: I am a cook, in the employment of Colonel Crofton. I know the accused, who was kitchenmaid there. I remember Colonel Crofton said accused would have to go next week, but he did not say when. Isabella Richmond heard that conversation, and she left the next week.

By Inspector: Colonel Crofton made the complaint to me.

By defendant's agent: I should think that Colonel Crofton meant me to tell the girl.

The following agreement was entered into by the accused:

162, New Bond-street, London, W., January 6, 1898.—I hereby agree to remain one year in Mrs. Crofton's service from date of arrival in Cape of Good Hope, and I will endeavour to give satisfaction in doing my duties as part kitchen and house maid. Wages to be £18. Beer money, £3. Washing found. Second-class passage out, and second-class accommodation back. This was signed by the accused, but not by Colonel or Mrs. Crofton.

No agreement was made before a Magistrate in this colony. The Magistrate found the accused guilty, and sentenced her to pay a fine of £1, or undergo fourteen days' imprisonment.

The following were the reasons for his judgment:

I do not know upon what grounds the accused is appealing; no legal point was raised in my Court, nor was there any special defence set up. The accused was not called upon by her agent, Mr. Shaw, to give evidence, and the only defence before the Court was the plea of not guilty.

The case seemed a simple one under the Masters and Servants Act of 1873. Accused was engaged by the complainant, Colonel Crofton, as part kitchen and house maid, to accompany him to South Africa, and in consideration of certain benefits she was to receive, amongst others, the free passage to the Colony, she gave a written undertaking in England to serve Mrs. Crofton for twelve months after arrival in the Colony. She accompanied the complainant to South Africa, and after working two months for Mrs. Crofton she left her place of employment. In view of the decision in the case of Sayers v. Thorne (3rd March, 1889), I found that the accused was liable under the Masters and Servants Act. The accused may have heard the conversation between Colonel Crofton and the cook (Mary McConville) but she was never told to leave by either the complainant or any one else acting on his behalf.

In finding the accused guilty and sentencing her to pay a fine of 20s. or fourteen days' imprisonment, I added an order that she was to return to service, but upon the complainant stating that he was not anxious to have the accused back, I immediately withdrew the rider necessitating her return to service.

The accused now appealed.

Mr. Buchanan for the applicant: This action must be strictly construed against the Master. It is not a proper contract in writing as required by the terms of Act 15 of 1856, section 1. There is no reciprocal contract entered into; the contract is with Mrs. Crofton and not with Colonel Crofton. It is not signed by either, and a contract in writing must be signed by both parties to it. Though the section does not expressly say so the intention of the Legislature is shown by Act 18 of 1873, section 1, which provides for contracts in writing entered into within the Colony and section 6 of Act 15 of 1856, which sets out the form of these contracts and provides that they shall be signed by both parties. *Re Lewis*; *ex parte Munro* (1 Q B. D., p. 724). That is the rule as far as civil suits are concerned and it applies with greater force in criminal prosecutions. The point was raised in *Falconer* v. *Juta* (1879, p. 22). In *Sayers* v. *Thorne* (7 J., p. 243) the contract was signed by both parties. *In re The New Eberhardt Company; ex parte Menzies* (43 Ch.D., p. 118). The Statute of Frauds is in favour of this contention inasmuch as that expressly requires the memorandum to be signed by the party to be charged. By the contract in question the master would not render himself liable to any of the penalties imposed by the Masters and Servants Acts. The contract is to serve Mrs. Crofton, and it is nowhere stated that she is the wife of Colonel Crofton or that she was acting on his behalf. Moreover, there is nothing in the evidence to show that Mrs. Crofton did not give the appellant permission to leave. It is necessary besides to show *mens rea*.

Mr. Molteno: The Magistrate had to satisfy himself as to the validity of the contract and the fact that the appellant was in the respondent's service was quite sufficient. But even if the contract was not originally valid yet it is clear that she is now in respondent's service; that is at any rate a monthly service, and she did not give a month's notice. This point was not raised in the Court below.

Mr. Buchanan: The Magistrate's reasons show that this point must have been taken. If there was no proper contract in writing the contract was only good for a month, and the appellant did not leave before the expiration of that time. Act 15 of 1856, section 2.

[De Villiers, C.J.: Does not the latter part of section 1 of Act 15 of 1856 make it a valid contract if the Magistrate is satisfied?]

That provides only a remedy for the want of a certificate but not for a want of writing.

Postea (June 21st).

The Court gave judgment, setting aside the conviction.

De Villiers, C.J.: In order to prove the contract of service Colonel Crofton put in a document signed by the appellant in England, by which she agreed to remain for one year in Mrs. Crofton's service from the date of her arrival in the Colony. Then the wages were fixed. This document is signed by Isabella Richmond, but it was not signed by either Colonel Crofton or Mrs. Crofton, and the question now is whether this can be held to be a contract in writing in terms of the Act 15 of 1856. The first section of the second chapter of the Act enacts that "No contract of service made elsewhere than within the limits of this colony shall be in force in this colony except the same should be made in writing and certified by the British Consul or other duly authorised authority; but contracts not so certified shall notwithstanding have force and effect in this colony upon other proof of such contract to the satisfaction of the Magisstrate before whom the same shall come in question." Now, I take this to mean that there must be a contract in writing in any case, and the Magistrate must be satisfied that it has been properly entered into. But the writing is a *sine qua non*. Now, the objection has been taken in the present case that this contract can not be said to be in writing, seeing that it was not signed by both parties, and I am of opinion that the objection was a good one. Unless the contract was assented to in writing by both parties to the contract, in my opinion it is not a complete contract in writing. Cases decided in England upon the Statute of Frauds do not afford us much assistance, because those decisions turned on the meaning of the words "signed by the person to be charged." The latest decision upon the question whether a contract is in writing or not unless signed by both parties, quite independent of the Statute of Frauds, was the case of *In re the New Eberhardt Company; ex parte Menzies* (43 Chancery Division, page 118). The question there arose as to whether a certain contract was not in writing in terms of the Act which required that all contracts relating to any new company about to be formed should be in writing and duly registered. That is under the 25th section of the Companies Act of 1867. The contract there had been signed by one of the parties and not by the other; and the Court of Appeal, in reversing the judgment of Mr. Justice Stirling, declared that the contract was not in writing. Lord Justice Fry, in giving judgment, said: "The contract must be in writing, by which I understand that both parties must signify their assent to the terms of it in writing, and that without going beyond the writing you can see the existence of the contract between the contracting parties." That seems to me to be a fair rule to lay down. In the present case both parties did not signify their assent in writing. The contract was signed by the servant, but not by the master. This contract in writing was the only one relied upon in the court below. As to the terms of service, it might have been argued that a fresh contract was made in the Colony to serve from month to month, but there is no evidence on that point, and as this contract, executed in England, was the only one relied upon to prove contract of service, I am of opinion that the conviction must be set aside.

Buchanan, J,: I concur in the construction which has been placed on the first section of Chapter II., of the Masters and Servants Act of 1856. It is quite possible, however, for the original contract entered into in England to be without force, and yet for the relationship of master and servant to have been otherwise created within the Colony. The interpretation clause of the Act defines as a servant any person employed for hire, wages, or other remuneration to perform certain handicrafts or in domestic service. If in this case there had been evidence to show that the relationship of master and servant existed otherwise than by reason of the English contract, I doubt whether the Court would have interfered with the conviction, especially as this point was not taken in the Court below. The defence before the Magistrate was not that appellant was not a servant, but that she was justified in leaving her service. It is quite possible that this defence may have put the respondent off his guard, but as he failed to prove the relationship, otherwise than by the English contract, and that contract not being properly executed, I concur in allowing the appeal.

Maasdorp, J.: The accused in this case was charged with and convicted of contravening clause 7, section 2 of Act 18 of 1873, by absenting herself without leave from the place appointed for the performance of her work. To establish this charge it seems to me necessary to prove that the accused was the servant of the prosecutor within the meaning of the Act, and committed the act charged in violation of her duty as such servant. It is necessary to prove that a contract of service within the meaning of the Act existed between them. Under the interpretation clause of the Act the words "contract of service" shall be understood to comprise any agreement, whether oral or written, whether expressed or implied, entered into between master and servant according to law. But under section 1 of chapter 2, no contract ~~of service~~ made elsewhere than within the limits of the Colony shall be of force within the Colony, except the same shall have been made in writing. A contract of service being a bilateral contract requires the mutual consent of the parties thereto, and in case there is to be a written contract it cannot, it seems to me, be said to have been fully executed until the consent of the parties has been expressed by their signature upon the document or documents constituting the written contract. An instance of a contract required to be in writing is given in our writers in case of a contract of sale, where it is agreed that the sale shall not be taken to be concluded until the agreement has been reduced to writing. In that case they say the parties are not bound until the written contract has been fully executed, for which purpose they say the signatures of the parties is essential. The prosecutor said in his evidence, "She, *i.e.*, the accused, entered my service in England immediately I made the agreement with her, and she accompanied me to South Africa." "She is engaged to me for twelve months." In support of this he put in a document, called by him a memorandum, but which is headed "Agreement between Isabella Richmond and Mrs. Crofton." This is signed by the accused, but not by Mrs. Crofton. If I am right in my opinion, then this is not a fully-executed written contract; it is not a written contract at all. And there is no agreement under section 1, Chapter 2, by which the accused became the servant of Mrs. Crofton. But it is contended that if the alleged agreement has no force or effect in this colony, the accused having entered upon her service after her arrival in the Colony must be taken to have entered into an implied or tacit agreement of service. Such tacit agreement, it is said, must be gathered from the intention of the parties as evidenced by their conduct. I agree that if it were proved that upon their arrival here they discovered the contract made in London was of no force and effect; that they abandoned it; and notwithstanding proceeded with the employment and service, then they may be taken to have proceeded upon a tacit agreement But there seems to me to be no such evidence. On the contrary, up to the last they appear to have looked upon the London agreement as subsisting. Their intention was to be bound by that contract, and no other. The fact that it was in reality null and void cannot affect their intention and make them parties to a tacit agreement when they themselves were acting upon what they believed to be an express written contract. I therefore come to the conclusion that the relation of master and servant, in terms of and for the purposes of the Act, was not proved to exist in this case, that the question of fact was put in issue by the plea of not guilty, and upon the failure of proof in this respect the accused should have been acquitted. In my opinion the conviction and sentence should be quashed.

Mr. Buchanan asked for costs.

De Villiers, C.J.: Colonel Crofton has paid the appellant's fare, and if he took civil proceedings he could recover the amount of her passage-money, which could be set off against the costs. As he is not going to do that costs will not be allowed.

[Appellant's Attorney, D. Tennant; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., (Chief Justice), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

R. V. ROSSER.

{ 1898. June 21st.

Act 15 of 1856, Chapter VI., section 3.

Contravention of the above section can not be punished by imprisonment with hard labour.

The Chief Justice said: A case has come before me as judge of the week, in which Edward Rosser was charged before the Magistrate of Cape Town with offering himself for service to Mr. East, a partner in the firm of Eaton, Robins & Co., and with forging a false certificate of character. There is no doubt the prisoner was guilty of the contravention of the third section of Chapter VI. of Act 15 of 1856 in forging a certificate of character. The sentence, however, goes beyond what the Magistrate is empowered to inflict by that Act. Prisoner was fined £10. or three months' imprisonment with hard labour. The Act, in defining the sentence, says the prisoner shall be fined not exceeding £50, nor less than £10, or by imprisonment for not more than twelve months, or by fine and imprisonment. Nothing is said about hard labour. I would like to have asked Mr. Sheil if there has been a subsequent Act by which hard labour may be imposed. I have not been able to find any such Act. It is curious that twelve months should be authorised, and yet three months with hard labour can not be given. The portion of the sentence imposing hard labour must be struck out.

SHORT AND CO. V. THE TOWN COUNCIL OF CAPE TOWN.

Mandamus—Order to pass plans—Regulation 159—General line of buildings.

On an application by S. to compel the Town Council of Cape Town to pass certain plans in connection with the erection of stores,

Held, *that the Court could not make such an order unless it was suggested that there had been dishonesty or fraud or improper motives on the part of the Town Council.*

Semble, *that the proper course was an action to have it declared that the applicants were entitled to build notwithstanding the want of consent of the Town Council on the ground that it was illegally withheld and on improper grounds.*

Held, further, *that Regulation 159, which empowered the City Engineer to decide upon the general line of buildings in any street, road, &c., should not be applied in a general way but to each particular case, and that the City Engineer's decision should not be given without reference to any disputes, but should in each case be given in reference to the particular dispute.*

This was an application on notice for an order compelling the respondents to pass certain plans in connection with the proposed erection of certain stores at the lower end of Buitengracht-street, Cape Town, without the building line, as laid down by the City Engineer upon the block plan annexed.

Samuel Short, one of the applicants, filed an affidavit alleging:

1. That on the 30th March last his firm had lodged the plans in question with the respondents.
2. That about the 14th April they were returned with an intimation that the building line laid down in the plan must be adhered to by virtue of Regulation 159.
3. That the said regulation is *ultra vires*, unjust, and unreasonable, and if enforced against his firm would deprive them of a piece of land 15 feet by 74 feet, without compensation, and would moreover render the building line of the street at that point irregular, as the line of existing buildings in that locality was up to the street line, and there was practically no possibility of setting

them back at the building line which the respondents were trying to force upon his firm.

4. That if the respondents wished to widen the street, they should expropriate in the usual way.

Regulation 159 was at follows: "No building, structure, or erection shall, without the consent in writing of the Corporation, be erected beyond the general line of buildings in any road, street, place, or row of houses in which the same is situate in case the distance of such line of buildings from the back line of the footway does not exceed 50 feet, or within 50 feet of the back line of the footway when the distance of the line of buildings therefrom amounts to or exceeds 50 feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the footway, and such general line of buildings shall be decided by the City Engineer, whose decision, if and when adopted by resolution of the Corporation, shall in all cases be final and conclusive."

The affidavit of Thomas Cairncross, the City Engineer, set out:

1. That deponent, in pursuance of the regulations, decided the building line in Buitengracht-street from the junction of Waterkant-street between Somerset-road and the Dock-road, which line was adopted by the Public Works Committee.

2. That he attached a plan showing the building line, cutting through certain properties on the north-west side of the street.

3. That this plan shows that Buitengracht-street is considerably wider above Waterkant-street than below, but the building line just above Waterkant-street on the south-east side is practically in a line with the first building in Buitengracht-street on the lower side of Waterkant-street, so that it would be reasonable and proper to maintain such line as a building line, the more so as the frontages of buildings in that line total a distance of 633 feet, while the vacant land is only 410 feet in all.

4. That on the other side (N.W.) of the street, however, the vacant land is only 648 feet in length, while the total frontage of building erected is only 476 feet, and of this frontage less than 288½ feet project seriously in front of the building as decided, while 82½ feet project to a slight degree only.

5. The line of existing buildings on the north-west side is irregular.

6. That having regard to the existence of so much vacant land and the irregular line of existing buildings, he said that he decided the building line as a reasonable one.

7. That the building line laid down was only 40 feet from the fronts of the buildings on the opposite side of the street, so that eventually the street would only be of that width.

8. That the existing regulations lay down that all new streets shall be 40 feet wide.

9. That there is every possibility that the building line of the street will eventually be set back to the decided line should the Council's action be *intra vires*.

10. That in the event of the Council desiring to widen the street, they would duly expropriate the land in front of the building line required for the purpose, and pay compensation.

11. That there was no objection to the applicants fencing in the ground and utilising the same for their purpose so long as the general line of building frontage was observed.

Thomas Ball, Mayor of Cape Town, also filed an affidavit corroborating that of the City Engineer, and supporting the position that the building line adopted was a reasonable one.

Mr. Innes, Q.C. (with him Mr. Close), appeared for the applicants.

Mr. Schreiner, Q.C. (with him Mr. McGregor), for the respondents.

Mr. Innes: Regulation 159 is *ultra vires*, and not authorised by section 170, sub-section 9, of Act 26 of 1893. That provides that the Council may make regulations "for securing the regularity of lines and levels of buildings, the class of architecture of buildings, and the removal, alteration, and prevention of projection or obstruction in front of buildings." Then they have not applied the regulation to any existing line of buildings but to an imaginary line. The line of buildings means the line of more buildings than one; that is, the line of the street.

The Council has taken section 75 of the English Statute, 25 and 26 Vict., C. 102, and turned it into a bye-law under the Cape Town Act. Section 74 of the English Statute allows of the setting back of a building which has fallen down or been demolished by fire, under compensation. That Act also draws a clear distinction between existing buildings and vacant land. There is nothing corresponding to these provisions in the Cape Town Act. Regulation 159 goes beyond the true intent and scope of section 170, sub-section 9.

A general line of buildings is not a general building line for the future but the general line of buildings in the street and that line must be adhered to for the future. *Lord Auckland* v. *Westminster Board of Works* (7 L.R. Ch., Appendix, p. 597). That case turned upon the distinction between sections 74 and 75 of 25 and 26 Vict., C. 102. "In determining the general line of building the architect must take into consideration the frontages of houses then existing." The architect's decision is final if he fixes a line as coinciding with certain houses in the street, but he has fixed a line which runs through many existing houses. *Barlow* v, *Parish of St. Mary Abbott's, Kensington* (11 App. Ca., p. 257). Dictum of Bramwell, L.J., at p. 267. "Section 75 uses the words 'street place, or row of houses.' This evidently means that a *row* of houses is to be looked for, that though there may be a general line of buildings in a street, yet if there is a row of houses not in that general line, the building is not to be beyond the line of the row, though within the line of the streets." *Spackm* *tead Board of Works* (10 App. Ca., p. 229), at p. 236, shows that the architect's decision is final provided he acts within his powers and on the right principle. If there are no two buildings in a line in a street there can be no line of buildings, and therefore the Council cannot prohibit an owner building up to the street line. *Fear* v. *Freebody* (4 C.B. (N.S.), p. 228).

Mr. Schreiner: If there are not two houses in the street in a line the architect is within the scope of his authority if he lays down a line which shall prevail. Under Regulation 40 all new streets have to be forty feet wide. The line of buildings on the opposite side of the street is very regular.

[De Villiers, C.J.: Could the architect say, as a portion of this street is 134 feet wide I will take that line as the line of buildings?]

That would be unreasonable.

[De Villiers, C.J.: Should not the Court confine itself to the buildings in the immediate neighbourhood of the house?]

Not if the architect whose discretion is conclusive fixes on a reasonable line within the scope of his authority. The line here is reasonable; it gives forty feet of street and is in line with at least one whole block. *Spackman* v. *Plumstead Board of Works* (10 App. Ca., p. 229), Judgment of Lord Watson at p. 245; *Kerr* v. *Corporation of Preston* (6 Ch.D., p. 463), at p. 467; Judgment of Lord Selborne in *Spackman's case* (p. 235); *Board of Works for the Wandsworth District* v. *Hall* (L.R. 4, C.P., p. 85); *Bruce* v. *Lawley* (6 J., p. 8); *Slattery* v. *Naylor* (13 App. Ca., p. 436) as to *ultra vires*. *Cruser* v. *Johnston* ("London Times," May 16th, 1898, L.T.R. 78, p. 647), as to a bye-law being *ultra vires* for unreasonableness; *Brewnscombe* v. *Johnson* (L.T.R., April 23rd, 1898, Vol. 78, p. 265); Act 26 of 1893, section 170, sub-sections 10 and 11. As to width of the street, sub-section 29.

Mr. Innes: In none of the cases quoted has the power claimed been exercised without compensation. The Council should expropriate for value.

Postea (June 22nd).

De Villiers, C.J.: In this case there was very little said in argument as to the form of the motion, although a great deal was said about the merits of the case. My chief difficulty in the present case is as to the form of the procedure employed by the present applicant. The notice is that an application will be made to the Supreme Court for an order compelling the respondents to pass certain plans lodged with them on the 30th March last in connection with the proposed erection of stores at the lower end of Buitengracht-street. The difficulty I refer to is this, that the Court cannot well compel the Town Council to pass a certain resolution giving a certain consent unless it is suggested that there has been anything like dishonesty or fraud or improper motives on the part of the Town Council. In the case of *Clark* v. *The Town Council* the Court did not decide that even if these motives had been present the Court would have afforded the particular remedy which was asked for. The Court said it would interfere. It did not say that the form of interference would be the one actually asked for in that case. In the present case we feel that there is the greatest objection to an order from this Court to compel the Town Council to pass certain plans. By law it was left to the Town Council to decide what plans should be adopted, and what should not; and by the regulations which have been framed in accordance with the law very large discretionary powers are vested in the Town Council, and the Court is now asked to take upon itself the functions of the Town Council, and to decide that the Town Council shall pass a resolution, or shall give a certain consent. I can understand a declaratory action being brought to have it declared that the applicant is entitled to build, notwithstanding the want of consent of the Town Council, on the ground that that consent is illegally withheld, and on improper grounds. If such an action had been brought, the Court would have been able to obtain more information with regard to the facts of the case than it has been able to obtain from the affidavits which are before the Court. I do not know whether the decision of the City Engineer was given upon a particular case submitted to him, or whether it was that he simply drew a general line for this street as he drew lines in other streets, without reference to any disputes which have occurred between the parties. The Court is unable now to give any definite decision upon the present case, but I think we might at all events indicate the view which the Court holds on cases of this kind. We think that Regulation 159 should be applied, not in a general way, but to each particular case, and that the decision of the City Engineer is not to be given in a general way without reference to any disputes, but it must in each case be given in reference to the particular dispute, and that therefore in the present case when the dispute arose between the applicant and the Town Council as to whether the applicant was entitled to build in accordance with his plans, the matter had to be referred to the City Engineer, and his decision had to be given in reference to that particular spot n question and the houses in the immediate neighbourhood, and it is quite possible that if the City Engineer had been called upon to decide in reference to this particular dispute he might have decided upon a general line, and not upon a general imaginary line which he has drawn. The line is an imaginary line, and not in reference to this particular case. If these views had been brought prominently before the City Engineer it is quite possible he may have come to the conclusion that so far as this dispute was concerned the general line in that street ought to be a line drawn along the two houses on each side of the applicants' property. It is not for the Court now to decide the point. The decision must be given by the City Engineer. We think that if the applicants wish for relief they must bring an action, the form of which must be decided by counsel, probably a declaratory action to have it declared that the applicants could build according to their plan without the consent of the Town Council, on the ground that the withholding of that consent is illegal. That would bring all the questions raised before the Court, and it would raise the question as to whether the regulation relied upon was *ultra vires* or not. That is a question which it is not open for us to decide to-day. If the regulations are *ultra vires*, the consent of the Town Council is not required at all. How can we compel the Town Council to give their consent? For these reasons we are of opinion that there can be no order upon the present application. As to the matter of costs, the Town Council has not raised the objection as to the point before us. The Town Council came forward on the ground that the City Engineer has decided this question, and upon that point we are not clear that he has done so. There is no information before us as to the basis which he has taken, but as far as I can see he has taken an imaginary line, and under these circumstances we are of opinion that there should be no order as to costs.

Buchanan, J., said: I concur in holding that no order can be made on the present application. I also concur in the view that the Municipal Regulations require the City Engineer to determine on the building line in each special instance. But when the City Engineer has considered the circumstances of the particular case, and given his decision thereon, the parties would do well to consider their position before taking further action. Assuming for the present that the regulations are not *ultra vires*, considerable latitude must be allowed in a street in which a great portion of the land has not been built upon, and where no two blocks of building which have been erected stand in the same line.

Maasdorp, J., concurred.

[Applicants' Attorney, Gus. Trollip; Respondents' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

CLOETE V. VAN AARDT AND THE RESIDENT MAGISTRATE OF BARKLY EAST.
1898. June 22nd

Amendment of Record of Magistrate's Court.

This was an application on notice for an order to amend the record in an action tried before the Resident Magistrate of Barkly East in January and February last, in which the applicant Cloete, on behalf of his minor daughter, sued the respondent for £18, medical expenses in connection with the birth of a child of which the respondent was alleged to be the father, and £2 for maintenance of the child. The Magistrate granted absolution from the instance, and the plaintiff noted an appeal from his judgment. He now applied for ten different amendments of the record in respect of the evidence recorded, alleging that that evidence was incorrect. The witnesses who had given the evidence in question filed affidavits denying its accuracy, and the plaintiff's attorney also alleged that he had taken notes of the evidence at the time it was given, and that the record was incorrect. On the other hand, the Resident Magistrate, the Assistant Magistrate and the Magistrate's clerk, who had respectively recorded the evidence of the various witnesses, alleged on affidavit that the record accurately stated the evidence as it was given.

Mr. McGregor appeared for the applicant.

Mr. Jones for the respondent.

Mr. Jones raised a preliminary objection to the procedure. There is no precedent for it. It is inconvenient. The only mode of interfering with the record of the Magistrate's Court is by way of review or appeal. The Court cannot on a motion order the record to be amended; the record can only be amended if there has been irregularity or illegality, and in that case a review of the proceedings is the proper course to adopt.

Mr. McGregor: *Ryneveld* v. *Bam* (3 M., p. 384); *Tarry & Co.* v. *Brown* (5 H.C., p. 305), are precedents for this application. Some of the mistakes made in the record are obvious; one is admitted; the presumption is that there are more.

[De Villiers, C.J.: The amendments appear to be quite immaterial to the point in the case.]

Mr. Jones, called upon as to costs: The Magistrate, Assistant Magistrate, and Magistrate's clerk who recorded the evidence all allege that it is correctly recorded as given. There is no reason why there should be any departure from the usual course as to costs, and no reason why they should abide the result of the appeal. The proceedings are wrong. *Ryneveld* v. *Bam* is not in point because the case was still pending and had been removed into the Supreme Court. In *Tarry & Co.* v. *Brown* the point of procedure was not argued and no order was made.

De Villiers, C.J.: It is very much to be regretted that this application has been made, as it seems to me that unnecessary costs have been incurred. The application is to amend the record in the face of the definite statement of the Magistrate and other officials concerned, and other witnesses who were present when the evidence was taken down. It is hopeless to ask this Court to decide that the applicants are right in saying that the evidence is wrong. The application must be refused. With reference to the difficult question of costs, I confess I do not see how the particular evidence which is objected to affects the merits of the case. The appeal case will have to be decided on the broad grounds of whether the plaintiff or the defendant was to be believed, and the minor points which were raised will not affect the case. The application must therefore be refused with costs. The parties ought to have gone to the appeal on the facts as they stood.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondents' Attorneys, Messrs. Findlay & Tait.]

CASES DECIDED IN THE SUPREME COURT,

CAPE COLONY.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., (Chief Justice), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

ADMISSIONS.

1898.
July 12th.

Mr. Benjamin applied for the admission of Gideon Brand van Zyl as an attorney and notary of the Court.

The order was granted and the oath administered.

Mr. Benjamin applied for the admission of William Henry Low as an attorney and notary of the Court.

The order was granted and the oath administered.

Mr. Close applied for the admission of William Stewart Blacker as a notary and conveyancer.

The order was granted and the oath administered.

PROVISIONAL ROLL.

WHITE, RYAN AND CO. V. FOUCHE.

Mr. Buchanan applied for the final adjudication of defendant's estate as insolvent.

The order was granted.

CROMBIE AND ANOTHER V. WARREN AND OSBORNE.

Mr. Jones applied for the final adjudication of defendants' estate as insolvent.

The order was granted.

HOCHSCHILD V. HAMMIN.

Mr. Jones moved for provisional sentence for the sum of £247 5s. 6½d., due on a promissory note, together with interest from 1st May, 1894.

The order was granted, subject to the production of a translation ôf the promissory note, which was written in Dutch.

ALBERTYN V. SWART AND OTHERS.

Mr. Maskew applied for provisional sentence on a mortgage bond for £450, with interest from September, 1894, less £45 paid on account, and an order declaring the property specially hypothecated executable.

Provisional sentence was granted, and the property declared executable.

YOUNG V. MATTHEW AND THORPE.

Mr. Close applied for the final adjudication of defendants' estate as insolvent.

Granted.

VAN DER SPUY V. HESSE.

Mr. Joubert applied for provisional sentence on an acknowledgment of debt for £126, being £91 for goods sold and delivered, and £35 the amount of a promissory note, with interest from May 28 last.

Provisional sentence was granted.

ZOER V. THERON.

Mr. Currey applied for provisional sentence upon a mortgage bond for £700, with interest at the rate of 5 per cent. from May 10, 1897, to May 10, 1898, and from the latter date at the rate of 6 per cent. Also that the property specially hypothecated be declared executable.

Provisional sentence was granted, and the property declared executable.

LONGWORTH AND CO. V. LOUIS MOSS.

Mr. De Waal applied for provisional sentence upon three promissory notes, each for £40, and for interest on the same from February 7, 1898.

Provisional sentence granted, subject to the production of a translation of the certificate of presentation, which was written in Dutch,

ILLIQUID ROLL.

GREEN AND CO. V. T. J. ROOS.

Mr. Buchanan applied for judgment under Rule 329 for £31 1s. 6d., due for goods sold and delivered, and also for provisional sentence for £41, due upon a dishonoured cheque.

Granted.

MALONEY V. SARGEANT.

Mr. Molteno applied for judgment under Rule 319 for a sum of £38 10s., for professional services rendered, medicine supplied, &c.

Order granted.

VOSPER V. REID.

Mr. Benjamin applied for judgment under Rule 329 for £209 9s. 7d., goods sold, and £20 5s., money lent. He also asked for an order attaching the sum of £45, belonging to defendant, and at present in the hands of the messenger of the Resident Magistrate's Court, Vryburg. A certain sum had been attached under an order granted by Mr. Justice Buchanan on June 24, and the £45 was the amount remaining after satisfying the previous claims. Counsel referred to *McIntosh* v. *Botha* (13 S.C.R., p. 8).

Granted.

ALFORD, WILLS AND CO. V. T. J. ROOS.

Mr. Molteno applied for judgment under Rule 329D for a sum of £18 16s. 3d., less £2 paid on account, for goods sold and delivered.

Granted.

BELL V. JOHN LOCKE.

Rule of Court 329D—Ejectment.

An order of ejectment may be granted upon a summons under Rule 329D.

Mr. Jones applied for judgment under Rule 329D for the sum of £44, for rent. He also applied for the ejectment of defendant from the occupation of certain premises in Long-street. The defendant had refused to give up the premises, although he had received legal notice to do so.

Counsel said he had not been able to find any case reported in which the order prayed for had been granted under Rule 329. In *Smith and Warren* v. *Harris* (5 G., p. 196) it had been refused, and it had been intimated that the application should be made under Rule 319, but Rule 319 did not seem to be applicable. and theCourt had recently given a very wide interpretation to the words "liquidated demand" in Rule 329. *Scott* v. *McColla* (5 Sheil. p. 352) : *Fortuin's Trustee* v. *Brannan* (7 Sheil. p. 384).

Judgment for the amount claimed was granted, and defendant ordered to give up the occupation of the premises on or before July 31.

GARDINER V. JAMES SCOTT.

Mr. Close applied for judgment under Rule 329D on a summons for the sum of £200 and costs. Counsel stated that the capital sum had now been paid, and therefore the costs only were asked for.

Order granted.

NORTJE V. LATSKY.

Mr. Gardiner applied under Rule 329D for the return of certain sheep leased by plaintiff to defendant under a certain agreement, or in the alternative the sum of £205, with interest at the rate of 6 per cent. from September 16, 1897, with costs of suit.

Judgment was given for the return of the sheep, or in the alternative payment of £205 with interest *a tempore moræ*.

CAPE TIMES LIMITED V. MARSHALL.

Mr. Benjamin applied for judgment, under Rule 329D, for the sum of £96 5s. 3d., being for printing and advertising.

The order was granted.

REHABILITATIONS.

Mr. Joubert applied for the rehabilitation of Harry Buirski, whose estate was surrendered on May 21, 1894.

Order granted.

Mr. Joubert applied for the rehabilitation of Gerhardus Nicholaas Michau, whose estate was surrendered on February 24, 1894.

Order granted.

Mr. Joubert applied for the rehabilitation of Jacobus Johannes Grobbelaar, whose estate was surrendered on April 27, 1894.

Order granted.

Mr. McGregor applied for the rehabilitation of William Anderson Helm, whose estate was sequestrated on March 13, 1882.

Order granted.

Mr. McGregor applied for the discharge from insolvency of George Kilgour, whose estate was sequestrated in March, 1894. The estate had not been finally wound up.

Order granted.

Mr. Gardiner applied for the rehabilitation of Frederick Pfuhl, whose estate was sequestrated in May, 1894.

Order granted.

GENERAL MOTIONS.

PETITION OF LODEWYK SERRURIER.

Mr. Buchanan moved that the rule *nisi* granted in this case be made absolute. The rule *nisi* was under the Derelict Lands Act, and was granted by Mr. Justice Buchanan on May 12. Service had been effected as ordered.

Order granted.

PETITION OF THE DUTCH REFORMED CHURCH OF HANOVER.

Mr. Joubert moved that the rule *nisi* granted by Mr. Justice Maasdorp on June 9, under the Derelict Lands Act, be made absolute.

Order granted.

KRIEL V. KRIEL.

This was an application to have an award of arbitrators made a rule of Court.

Mr. Schreiner, Q.C. (with whom was Mr. Jones), for the applicants; Mr. Innes, Q.C. (with whom was Mr. Molteno), for the respondent.

The applicants (plaintiffs in a suit pending before the Court) had claimed an interdict and damages against the respondent, his brother. Issue was joined, but after the pleadings had been closed a deed of submission was drawn up, and the matter referred to two arbitrators who had awarded upon several matters, and also that respondent should pay three-fourths of all the costs incurred by the applicants in connection with the case, including personal expenses and costs between attorney and client.

Mr. Innes consented to the application.

An order was granted accordingly.

IN THE MATTER OF THE MINOR S. J. GOUWS.

This was an application for the appointment of a *curator ad litem* for the purpose of looking after the minor's interests in the partition of certain property in which he had a share.

Mr. Benjamin appeared for the applicant.

The Court appointed Mr. Cloete, attorney, of Jansenville, as *curator ad litem*, on the understanding that final transfer of the property would not be taken without the approval of the Master of the Supreme Court.

ESTATE OF THE LATE M. H. JANSE VAN RENSBURG.

This was an application for the cancellation of a certain mortgage bond, which could not be found, and which was supposed to have been paid, no claim thereon having been made since 1876.

Mr. Joubert for the applicant.

The Court granted an order calling upon all persons concerned to show cause by the first day of next term why the bond should not be cancelled. This rule to be served personally upon Mr. G. W. Steytler, the executor in the estate, and to be published once in the "Government Gazette."

Postea (August 1st).

The rule was made absolute.

LEVER BROTHERS, LIMITED, V. THE STAR PERFUMERY AND SOAP COMPANY.

1898.
July 12th.

Trade-mark — Infringement—Interdict.

This was an application under the Trade Marks Act, for an order restraining the respondents from infringing applicants' trade mark. The applicants were manufacturers of "Sunlight" soap carrying on business at Port Sunlight, in the county of Chester, England, and the respondents carried on business at Cape Town and Rondebosch. The notice of motion called upon the respondents to show cause why an order should not be issued interdicting them from selling soap in packages having labels which were colourable imitations of the plaintiffs' trade mark. An affidavit of the managing director of the plaintiff company was read in support of the motion, in which he stated that the labels used by the respondents almost exactly resembled those used on the plaintiffs' boxes.

The answering affidavit of Emil Hesse, managing partner of the respondent company, stated that the company were the manufacturers of Starlight soap. Prior to the receipt of the notice on July 2 last he was unaware that the applicants' label was registered in this colony, but so soon as he did become aware of the fact he instructed his attorney to inform the applicants that all portions of his label alleged to be an infringement would be discarded. He tendered the applicants taxed costs, and gave an undertaking to use a different label, with "Starlight" printed diagonally across it.

One of the sides of plaintiffs' labels, representing a view of the works, &c., was admittedly not registered in this colony. On one of the sides of respondents' label was a view of the work with Table Mountain in the background. This it was held was no infringement of the plaintiffs' trade-mark, and it was not intended to give it up.

Mr. Innes, Q.C., for the applicants: Although the respondents say they will discontinue this label we come into court for a formal order. They do not say what label they propose to use. The imitation is such an absolute imitation that we are justified in coming into court.

Mr. Schreiner, Q.C., for the respondents: We give up everything except the back label. This is simply a question of costs.

De Villiers, C.J. said: The learned counsel for the respondents has naturally tried to minimise his clients' conduct, but there is no doubt whatever that the respondents have as closely as possible imitated the design of the applicants. That may not be exactly fraud, but at all events it is not such conduct as the Court will treat very lightly. Notwithstanding the respondents' disclaimer before the case came into court, the applicants are quite justified in coming into court. The Court will interdict the respondent from selling or exposing for sale any soap or perfumery in packages or boxes having labels similar to that of the three sides of the applicants' boxes, the fourth side being excepted. The interdict will be with costs against respondents.

[Applicants' Attorneys, Messrs. Walker & Jacobsohn; Respondent's Attorney, A. Kenealey.]

SMIT V. VAN DER MERWE.

Mr. Benjamin moved for leave to attach certain landed property at Steynsburg, and sue by edictal citation in an action about to be brought for the recovery of £40 due on a mortgage bond.

An order was granted, personal service to be effected, the summons to be returnable on August 4.

INSOLVENT ESTATE OF NICHOLAAS GABRIEL HAUPT.

This was an application for an order authorising the Master to call a meeting of creditors in the estate and take the necessary steps for electing a new trustee, the trustee previously appointed having died, with the consequence that the estate had not been wound up.

Order granted.

ESTATE OF THE LATE HENRY EDWARD BEKKER.

Mr. Jones moved for leave to sell certain portion of the landed property in the estate, and mortgage other portions, in order to pay debts. The Master's report was favourable.

Order granted.

KOCH AND DIXIE V. AVENARIUS AND ANOTHER.

1898.
July 12th.

Trade-mark—Registrar of Deeds—General rules—*Ultra vires.*

One of the General Rules framed by the Registrar of Deeds under the 7th section of Act 22 of 1877 provides that an objection to the registration of a trade-mark shall be deemed to have been abandoned unless the person objecting proceeds within a certain specified time to have the objection set aside by a competent Court.

Held, *that such a provision is* ultra vires *except in the case of several persons claiming to be registered as proprietors of the same trade-mark.*

The 1st Section of the Act does not prohibit proceedings in the Supreme Court to prevent the registration of a mark not falling within the legal definition of a trade-mark but such proceedings should not, as a general rule, be taken until the Registrar has decided upon the application for registration.

This was an application for an order restraining the Registrar of Deeds from registering a certain trade-mark.

The respondent Avenarius had given notice in the "Government Gazette" of their intention to apply on the 25th May for the registration of the word "Carbolineum" as a trade-mark in respect of a chemical substance used for agricultural and horticultural purposes, Class 2. The applicants objected to the registration of that word on the ground that it had reference to the character or quality of the goods, and therefore did not come within the definition as laid down by section 2 of Act 12 of 1895, the word being common to all manufacturers and sellers of wood preservers. Mr. Baethke, of the applicants' firm, filed an affidavit in which he averred that they were the local representatives of the German firm of Von Baerle and Wollner, manufacturers and exporters of Carbolineum and as such representatives sold quantities of Carbolineum in this colony: he said that if the respondent was registered as the sole proprietor, not only would the interests of their clients be affected but their own business. Affidavits filed on behalf of the applicants alleged that the word "Carbolineum" was well known as a term applied to certain preparations from coal tar, used like coal tar itself for the impregnation of wood or walls in order to protect them.

Mr. W. G. Fairbridge, of the firm of Fairbridge, Arderne & Lawton, the respondents' attorneys, filed the following affidavit:

1. The applicants have served upon my firm a notice of motion with affidavits in support thereof, calling upon the respondents to show cause against restraining the Registrar of Deeds from registering as a trade-mark the word "Carbolineum" in respect of which the respondent Richard Avenarius has made application to the Registrar of Deeds.

2. No direct communication with regard to the objection of the applicants has been received by my firm, but the notice dated 18th June, 1898, addressed by the applicants' attorneys to the Registrar of Deeds and annexed to Mr. Baethke's affidavit has been forwarded to my firm by that official. No notice has been given by the applicants of their intention to take proceedings forthwith in the matter.

3. On the 29th ultimo my firm communicated with the agent of the said Richard Avenarius in Germany, requesting instructions with regard to the objections of the applicants.

4. Registration of the word objected to would have to be effected by the 26th August next, and it is the intention of my firm to request the Registrar of Deeds to defer his decision on the application, until after such time as my firm would have been able in due course to receive instructions in the matter.

5. The Registrar of Deeds has not yet given any decision on the claim of the said Richard Avenarius to have the word "Carbolineum" registered as a trade-mark, nor has any application been made by my firm that the Registrar should consider the matter at the present time. The Registrar has informed me that he has not yet considered or given any decision on the question, and that he has not been asked by the applicants to do so.

6. It is embarrassing to my client to have these objections taken at the present time. The objection taken by the applicants has been fully communicated to him and his decision will in due course be received and acted upon. There is not, so far as I know and believe, any urgency in regard to the present application; the same should as a matter of convenience and economy have been postponed until after my firm had time to receive instructions from my client, who also maintains the present application is premature in law.

Mr. D. Tennant, the attorney for the applicants, in an answering affidavit said that the regulations in connection with the Trade Marks Act as to service of duplicate notices of objection upon the Registrar of Deeds had been duly carried out and that the Registrar had served the duplicate notice upon the respondents' attorneys, and that there was therefore no need for any service of another notice, and that as the time for proceeding to set aside the application was limited to thirty days it was deemed advisable to apply to the Court on the first Court day. He said further that all the documents now before the Court were first submitted to the Registrar and his endorsement appeared upon them, and that the respondents' attorneys had had notice of the objection on the 18th June and could have communicated in time with him as to an extension of time in which to communicate with their client.

Rule 13 of the Rules framed under the provision of Act 22 of 1877, section 7, was as follows: "Any person objecting to the registration of a trade-mark must give notice in duplicate (signed by himself or his solicitor to the Registrar of Deeds before the expiration of thirty days after the last advertisement of the application. Such person shall state the grounds of his objection and shall, before the expiration of thirty days, or such further time as the Registrar of Deeds may allaw, after the date of lodging his objection, proceed to have the application set aside by some competent Court, failing which the opposition shall be deemed to be abandoned."

Mr. Schreiner, Q.C., appeared for the applicants.

Mr. McGregor for the respondents.

[De Villiers, C.J.: Has not the Court laid down that the Registrar should first decide upon the application?]

Mr. Schreiner: Not in cases of this nature. *Dieterle* v. *Stark* (6 Sheil p. 368) *Lewis* v. *Lazarus* (13 Juta, p. 420). Act 22 of 1877, section 1 enacts that "a person shall not be entitled to institute any proceeding to prevent or to recover damages for the infringement of any trade-mark as defined by this Act until and unless such trade-mark is registered in pursuance of this Act." We are not claiming that there has been any interference with our registration. We claim under the general law.

Maasdorp, J.: The point was taken later in *Dieterle* v. *Stark*.

Mr. Innes: At the subsequent application for leave to file an amended plea (*Stark & Co.* v. *Dieterle* 7 Sheil, p. 96). I think the discharge of the interdict originally granted was made a condition of the amendment being allowed.

De Villiers, C.J.: In the cases mentioned there was an alleged infringement. In the present case it is said there is no registration at all.

Mr. Schreiner: The jurisdiction of the Court is not limited when an infringement is complained of, *Peak Frean & Co.* v. *Carr & Co. Limited* (*supra*, p. 207).

[De Villiers, C.J.: Strictly speaking section 1 of Act 22 of 1877 does not apply here. But as a matter of practice and convenience why do you not take the decision of the Registrar?]

Rule 13 prevents us. This Rule was held inapplicable in *Lewis* v. *Lazarus*.

[De Villiers, C.J.: If the Registrar were to register the respondent's trade-mark could you not apply then for its removal?]

We should then be held by Rule 13 to have abandoned our objection.

Mr. McGregor: What the Court looked at in *Lewis* v. *Lazarus* was not the fact that there was a registered trade-mark. At p. 435 it was said "That rule can only bind so far as it is allowed by the Act. The Registrar of Deeds should adjudicate upon the claims before the parties can come into Court"; and at p. 427 "the first question to be determined is whether the respondent's proposed trade-mark shall be registered or not, and the 5th section of the Act clearly contemplates that such a question shall in the first instance be decided by the Registrar." Where there is a question as to the rectification of the register this Court is the proper form—otherwise the proper machinery must be followed. *Peek Frean & Co.* v. *Carr and Co.* was an application for rectification. Our procedure attempts to follow the English procedure. In England the Controller has complete cognisance in the first instance. *Re The Eastman Photographic Materials* (76 L. T., p. 730) I admit that section 1 of Act 22 of 1877 does not apply but section 5 seems to require that the Registrar should be asked to adjudicate in the first instance. Section 5 says "if the Registrar refuses to enter on the register as proprietor of a trade-mark the name of any person who is for the time being entitled to the exclusive use of such trade-mark in accordance with this Act or otherwise in accordance with law . . . . any person aggrieved may apply in the prescribed manner for an order of the Court that the register may be rectified." This section seems to have been relied on by the Court in *Lewis* v. *Lazarus* as well as section 1,

Mr. Schreiner: As to the functions of the Controller in England see *Kerly on Trade Marks* (p. 81.) The Rules framed under Act 22 of 1877 section 7 having been laid before Parliament have the same force as if they were part of the Act. The papers have been placed before the Registrar of Deeds and he has endorsed them. We have done everything which it lay upon us to do.

De Villiers, C.J.: Where a person objects to the registration of a trade-mark his proper course is to raise his objection in the first place before the Registrar of Deeds. If that official unproperly registers a mark as a trade-mark, this Court has ample powers under the 5th section of the Act 22 of 1877 to rectify the register. I am not prepared to lay down an absolute rule that the Court should, under no circumstances, interfere to prevent an unproper application to the registrar. Under the 1st section of the Act no proceeding to prevent the infringement of a trade-mark can be instituted until such trade-mark is registered, but that section does not prohibit proceedings to prevent the registration of a mark not falling within the legal definition of a trade-mark. As a general rule, however, such proceedings should not be taken in this Court until the registrar has decided upon the application. The applicants who seek to restrain the registration of the term "carbolineum" as a trade-mark, admit that the registrar can decide the validity of the mark in the first instance, but they say that they were forced into making the present application by the rules framed by the registrar under the 7th section of the Act. The latter part of the 13th rule certainly provides that an objection to the registration of a trade-mark shall be deemed to have been abandoned unless the person objecting proceeds within a certain specified time to have this objection set aside by a competent Court. This provision is not, in my opinion, justified by anything appearing in the Act. The only case in which the registrar can relief himself of the responsibility of deciding on the validity of a trade-mark proposed to be registered is where each of several persons claims to be registered as a proprietor of the same trade-mark. No such claim is made by the present applicants. Their objection is that the term "carbolineum" is descriptive of an article which they have for years been importing into this Colony, and that it cannot be legally registered as a trade-mark. It is the duty of the registrar to decide as to the validity of that objection and the provision of the 13th rule which releases him of that duty must be declared to the *ultra vires*. There will be no order upon this application and as to the question of costs it must stand over until the registrar has given his decision.

[Applicant's Attorney, Mr. D. Tennant; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

TAYLOR V. TAYLOR.

Mr. Innes, Q.C., moved for a decree of divorce. An order had been granted on May 2 last calling upon respondent, petitioner's husband, to return to her by June 15, or to show cause on July 12 why a decree of divorce should not be granted. Personal service had been ordered by the Court and had been effected on the respondent in Rhodesia but the order had not been complied with.

The Court granted a decree of divorce as prayed.

PETITION OF BARBARA JOHANNA JACOBA VAN HELSDINGEN.

Mr. McGregor asked that a rule *nisi* granted under the Derelict Lands Act, with regard to transferring a certain piece of land into the name of the petitioner, be made absolute.

Order granted.

IN THE ESLATE OF THE TATE MARTHA FRANCES WHITE.

Mr. Buchanan applied on behalf of the petitioner, the executor dative in the estate of his late wife, for leave to sell and mortgage certain property in the estate at Steynsburg.

An order was granted in terms of the Master's report.

IN THE MATTER OF THE LUNATIC ARTHUR FIELD JAMES.

Mr. Innes, Q.C., applied, on the petition of Dr. Le Roux, of Kokstad, for the appointment of a *curator bonis* in the estate of Arthur James Field. Affidavits by the petitioner, Dr. Johnson (District Surgeon of Kokstad), and Dr. Hislop (the medical officer of the Natal Government Asylum, where James is now being treated as a patient) were put in, to show that James was a lunatic owing to excessive drinking. He had no relatives in this country, but his relations in England had been communicated with, and Dr. Le Roux had received a telegram from his father asking him to take charge of James.

The Court granted a rule calling upon James to show cause why he should not be declared incapable of managing its affairs citation to be returnable on August 18. Dr. Hislop, of the Natal Government Asylum, was appointed *curator ad litem*.

Postea (August 1st).

Mr. Innes, Q.C., asked for an amendment of the order, by the substitution of the name of Dr. H. R. Brown, or Superintendent for the time being of the Natal Government Asylum, in place of the name of Dr. Hislop, who was at present in England.

The amendment was allowed, and permission was also given to send the order by telegraph.

IN THE ESTATE OF THE LATE HANNAH MARTHA VAN MEERTEN.

Mr. Benjamin applied for an order authorising the Registrar of Deeds to transfer certain landed property in the above estate, The petitioner was the daughter and executrix of Hannah Martha van Meerten, who had been married in community of property to Gerrit, van Meerten, but whose husband had left the Colony in July, 1876, and had not since been heard of, so that the property being registered in his name, it had been impossible to have it transferred on her death.

The Court granted a rule *nisi* calling upon persons concerned to show cause by the first day of next term why the applicant should not be appointed *curator bonis* of the joint estate, with power to sell and transfer the estate, and after paying off the debts to pay one-half into the hands of the Master for the estate of Gerrit van Meerten, and the other half into the estate of the late Hannah Martha van Meerten.

Postea (July 13th).

Mr. Benjamin again referred to this case and said that on the previous day he had not been in possession of all the facts, with the result that a judgment was given which would cause some little hardship. Yesterday he had stated that he did not think there was a house on the land, but he was now informed that there was a house there. There were four children living in the house, and conducting a boarding-house, and he now asked that half the property should be transferred to them. These children were heirs under the will. The proposal he now made was, if possible, to amend the order, transferring half of the property to these children, leaving the other half undecided upon until it could be ascertained whether the father of these children was living. Counsel pointed out that a copy of the transfer deed was also asked for, as the original had been lost.

The order was amended in accordance with the proposal, the rule to be published once in the "Government Gazette," and the Registrar of Deeds authorised to give a copy of the transfer deed to the applicant.

Postea (August 1st).

The rule was made absolute.

[Applicant's Attorneys, Messrs. Van Zyl, Buissinne & Leonard.]

LOCKE V. BELL.

This was an application to have a rule *nisi* made absolute, setting aside the attachment of certain property. The applicants were John Nathaniel Locke and Letitia Locke, the son and daughter respectively of one John Locke, against whom a judgment had been obtained by the respondent on the 2nd May, 1898, for £80, the rent of certain premises occupied by him. It appeared that execution issued and certain movable property had been attached upon the premises in question owned by the respondent. This property had been advertised for sale on May 31, but on the day of sale it was claimed by one H. M. C. Smuts as his property, and the sale was thereupon abandoned. Subsequently the furniture in the house in which the defendant resided, and of which the respondent was not the landlord, was attached and advertised for sale on June 20. Thereupon the applicants filed affidavits alleging that the furniture was their private property and obtained a rule *nisi*, operating as an interdict, and calling on the respondent to show cause why the attachment should not be set aside.

The respondent, Anthony Bell, filed an affidavit declaring that he was not in a position to refute the statements made by the applicants, and left the matter in the hands of the Court.

Mr. Upington appeared for the applicants; Mr. Jones for the respondent.

After argument,

De Villiers, C.J. said: The Court will continue the interdict restraining the respondent from selling the property pending an action to be brought forthwith by applicants against him to have it declared that the property belongs to them. Costs will abide by the result of that action. If the applicants do not bring their action on for trial by the August term, then costs will be against them, and the interdict will cease.

[Applicant's Attorneys, Messrs. Van Zyl, & Buissiné: Respondent's Attorney, Mr. D. Tennant.]

IN THE MATTER OF ROSE LEVIN, A MINOR.

Mr. Innes, Q.C., applied for an order authorising the sale of the minor's share in certain land.

The application was granted.

Ex parte GEORGE CHARLES BRISLEY.

Mr. Buchanan applied for an extension of the return day of a rule *nisi* granted with the Derelict Lands Act.

The return day was extended to the 1st August.

Postea (August 1st.)

The rule was made absolute,

Ex parte JAN VOS.

Mr. Benjamin applied for leave to sue *in forma pauperis* in an action for damages. The matter was referred to counsel for certificate.

IN THE MATTER OF THE MINORS GLYNN.

Mr. Jones applied on behalf of the father and natural guardian of the minors for leave to mortgage certain landed property belonging to them. The property had been transferred to them by way of donation from himself some years ago, and he had now been compelled by the municipal regulations to spend a considerable sum of money upon drainage of the buildings. To defray this expense he asked for leave to mortgage the property.

The application was granted.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

Re THE ESTATE OF KAREIM AND EVA CARELSE, DECEASED. 1898. July 13th.

This was an application by the executors testamentary of Kareim Carelse and the executor dative of Eva Carelse.

The petition showed that Kareim and Eva Carelse were married in community of property and in 1884 executed a joint will; that on 31st December, 1891, Eva Carelse died, leaving the said will in full force as regarded her half-share of the property of the marriage: that on the 23rd October, 1895, Kareim Carelse executed another will and died in 1896; that the executor under the will of 1884 refused to act and the executors under the will of 1891 thinking they were entitled so to do in April, 1898, sold the landed property which was registered in the name of Kareim Carelse.

That the executor dative of Eva Carelse was prepared to consent to the confirmation of the sale, but that as one of the heirs under the will of 1884 was a minor it was necessary to get the sanction of the Court.

Mr. Benjamin appeared for the applicant.

The Master having reported that he believed the minor would benefit by the sale the sale was confirmed.

Re THE ESTATES OF PHILIP RUDOLPH BOTHA AND PETRUS JOHANNES FOURIE, DECEASED.

This was an application by Catharina Maria Fourie and the children of her marriage with P. G. Fourie

The petition set out that the first-named petitioner was the daughter of the late Philip Rudolph Botha, and was married in community of property to the late P. G. Fourie, and sued as executor of the estates of both the aforesaid as well as in her individual capacity.

That on the 13th January, 1858, the aforesaid P. R. Botha and A. G. Botha, his wife, executed a will by which they bequeathed to the first-named petitioner all their landed property subject to certain conditions, and that at various times during the years 1885 and 1886 transfer of such property was passed to P. G. Fourie subject to the provisions of the will.

That on the 19th April, 1898, the first-named petitioner executed a notarial bond renouncing her life interest in the property.

That on the 12th October, 1895, she and P. G. Fourie executed a will and codicil bequeathing their landed property to their children subject to certain conditions.

That on the 19th April, 1898, she signed a deed renouncing her life interest in the property bequeathed under this will.

That she was desirous of passing transfer to her children subject to the conditions of the said will and codicil of all land under the wills mentioned, and the children, the other petitioners, were desirous of taking transfer and thereafter subdividing the properties.

That it was proposed in each of the subdivisional transfers to insert a clause by which in the event of any of the children dying before the first-named petitioner his or her share should devolve on his or her children *per stirpes*.

That the Registrar of Deeds was not prepared under the circumstances to pass transfer of the property to the children.

The petitioners therefore, prayed for an order authorising the Registrar of Deeds to pass transfer into the names of the children:

(*a*) All the property bequeathed under will of P. R. Botha and A. G. Botha, subject to the terms of the will.

(*b*) All the property bequeathed under the will of P. G. Fourie and the first-named petitioner.

(*c*) Subdivisional transfers of all property bequeathed as aforesaid and sub-divided as shown in an annexed power.

Mr. Innes, Q.C., appeared for the petitioners.

De Villiers, C.J., said that before the Court made any order they would like to have a report from the Resident Magistrate at Somerset East as to whether the proposed subdivision of the property would be to the benefit of those entitled to the farms on the death of the petitioners or any of them.

IN THE ESTATE OF THE LATE JOHANNES ALBERTUS LAUBSCHER, SEN.

Mr. Close applied for an amendment of the order granted on April 12, 1898, that leave might be given to expend the minors' funds in their education at any school approved of by the Master.

Granted.

IN INSOLVENT ESTATE OF MATTHEW AND THORPE.

Mr. Close applied for the appointment of a provisional trustee in this estate.

The order was granted.

Mr. G. W. Steytler was appointed, with power to sell live-stock and perishables.

CILLIERS V. DE WET AND ANOTHER.

Mr. Close applied for the award of arbitrators to be made a rule of Court.

Granted.

IN THE INSOLVENT ESTATE OF WARREN AND OSBORNE.

Mr. Jones applied for the appointment of a provisional trustee in this estate.

The application was granted, Mr. Mouatt being appointed, with power to sell a certain cart, horse, and harness.

IN THE ESTATE OF THE LATE JOHN PATERSON.

Mr. Close applied for an order for the issue of a certified copy of a certain deed of hypothecation which had been lost.

The order was granted.

IN THE ESTATE OF THE LATE WILLIAM AND ELIZA HOBBS.

Mr. Schreiner, Q.C., applied for the confirmation of certain arrangements entered into by the heirs in this estate.

Granted.

SPRECKLEY V. SPRECKLEY.

Mr. Benjamin, on behalf of Sarah Magdalena Spreckley, applied for leave to sue, *in forma pauperis*, in an action for the restitution of conjugal rights.

Applicant, being sworn, said she and her husband were married in 1884. There were three children born of the marriage, who were now living with her mother in Cape Town. Her husband left her in 1894, and since that time he had not contributed anything to their support. She heard from her husband in Johannesburg in 1896, but she had not heard anything of him or from him since that time. He was a bookkeeper. She maintained herself and her children by taking in sewing and dressmaking. She had no means of prosecuting an action.

De Villiers, C.J., said the case seemed a *bona fide* one, and the application was granted.

VAN NIEKERK V. VAN NIEKERK.

1898.
July 13th.
Aug. 1st.
„ 19th.

Will—Execution—Witnesses—Signature—Obliteration.

A witness to a will, who was unable to write, held the pen at the top, whilst another person wrote the name of such witness. It was proved to the satisfaction of the Court that the transaction was bona-fide *and that the witness held the pen with the object of thus attesting and subscribing the will.*

Held *that his attestation was valid.*

After the due execution of the will the person who had drawn it struck out the name of the testator appearing after the testator's mark and induced a third witness to attest the will. This was done without the testator's knowledge.

Held *that the irregularity thus introduced did not affect the validity of the will.*

This was an application by Nicolaas Frederick and Lodewyk Stephanus van Niekerk, sons of the late Adam van Niekerk, for an

order authorising the Master of the Supreme Court to recognise the will of their father, dated 7th November, 1897, as his last will and testament.

The petition stated that the will in question was signed by the testator making his cross at the end of the first page and that his cross was there duly attested by two witnesses, viz.: Salie Jacobs and Ben. F. Duminy: that upon the following page were set forth certain provisions not affecting the beneficial disposition of the estate though including the nomination of an executor, and that the said page also bore the cross of the testator but that it appeared that the cross and the name "Adam van Niekerk" had been ruled out and at the foot of the said page the names appeared as follows:—

x
L. S. van Niekerk, } Ben. F. Duminy.
Salie Jacobs.

That the Master had informed the petitioners on their filing the will that in view of the concluding paragraph of section 7 of Ordinance No. 105 he was unable to recognise its legality inasmuch as he considered that it had not been signed by the testator at the foot or end thereof as required by section 3 of the Ordinance. That the petitioners had been informed that on the 21st March, 1895, the testator had executed another will different to the one of the 7th November, 1897. There were annexed to the petition letters to the Master asking him to cause an edict to be published for the purpose off appointing an executor dative, and his reply stating that he had notified to the executors under the will of 21st March, 1895, his willingness to grant them letters of administration. Lodewyk Stephanus van Niekerk filed an affidavit alleging that he signed the will at Durbanville on the 9th November, 1897, when he went to fetch the will at Mr. Ben. F. Duminy two days after the will was duly signed and executed, but he did not sign his name at the place and time at which the will was made: that it was at the request of Duminy that he signed: that after he signed he noticed Duminy rule out some name at the foot or end thereof, but deponent was positive that when requested to sign his name the erasure as described in the petition was not there.

Salie Jacobs, one of the witnesses to the will, stated on affidavit that the testator had made his mark, *i.e.* himself and Duminy, and witnesses had signed in compliance with the Ordinance 15 of 1845 on both pages at Eensgezind, the testator's place, and that subsequently he was present at Durbanville when L. S. van Niekerk also signed.

This affidavit was not signed, but had affixed to it the cross or mark of Salie Jacobs. The affidavit of Benjamin Francis Duminy, enrolled agent, alleged that he had drawn up the will at the request of the testator, and the testator had made his mark in the presence of himself and Salie Jacobs, all being present at the same time on the 7th November. That two days afterwards L. S. van Niekerk called at his house for the will, and that he then requested him to sign his name, that he (Duminy) had himself ruled out the name of Adam van Niekerk at the end of the will on the 9th November, but that he had done it in error, and certainly not at the request of the testator.

Mr. Schreiner, Q.C., for the applicant.

The first part of the will is quite valid. *In re Lloyd* (S.C. 12, p. 117). What is written on the next page is surplusage.

[De Villiers, C.J.: What the Court has to decide is, what is the foot or end of the will.]

There is nothing in the Wills Ordinance to prevent the Court from holding, where the portion of the will which occurs after the signature is purely formal, that it is mere surplusage.

De Villiers, C.J., said: I think the Master was quite right in refusing to admit the will, because there was an irregularity which required explanation. The first page of the will was correctly signed, but on the second page there was a cross, and after it the name of the testator, Adam van Niekerk. Then Salie Jacobs signed, and in another line, Ben. F. Duminy signed as a witness. But subsequently for some unexplained reason Ben. Duminy got one L. S. van Niekerk to sign the will under the cross of the testator, and after or before this was done, Adam van Niekerk's name was struck out. The cross apparently was not intended to be struck out. The line reached the cross, but the greater part of the cross still remained clear. Well, it was obvious that the testator could not sign his name, and had to sign by his mark, because on the first page appeared his mark before his name. Seeing that this alteration was made after the will had been executed, I do not think that the heirs or legatees under the will ought to suffer from this alteration. The will was apparently duly executed, and the alterations were made in the absence of the testator. It is not even clear whether the testator was alive or dead at the time the alterations were made. We think some rule ought to be granted, and that this rule ought to be served on testator's children, except the two legatees. We will make a rule calling on the children of the testator to show cause by August 1 why the will should not be certified by the Master.

Postea (August 1st).

Mr. Schreiner, Q.C., for the applicant, stated that it had been impossible to effect service on three out of the ten children—one being in Tasmania, another in service in England, while the third was last heard of at Barberton two years ago.

Mr. Currey appeared to show cause for Constant David van Niekerk. The affidavit of the respondent questioned the legality of the will, alleging that at the time his father made the will he was in his dotage, and was incapable of transacting his business. It was also alleged that the will was not properly attested. This affidavit was supported by the affidavit of G. G. Loubscher.

Mr. Schreiner read the affidavit of Dr. Murray, of Durbanville, who deposed that he was called in to see the late Adam van Niekerk on November 6, the day previous to his executing the will, and found him of sound mind, and capable of managing his affairs. In conversation he mentioned that his sons, Lodewyk and Nicolaas, were to inherit the farm, and he laid special stress on the fact that Constant was to be disinherited.

Mr. Currey: Salie Jacobs's affidavit has no signature but a mark: the will purports to have the written signature of Salie Jacobs. The presumption therefore is either that Salie Jacobs did not witness the will or that it was a different Salie Jacobs and not the deponent.

Mr. Schreiner: This point was not raised on the affidavits. If the Court wishes to have oral evidence it may be taken without action, this being a probate matter.

[De Villiers, C.J.: Will you object to evidence as to the testator's state of mind?]

That is not a probate matter and should properly be tried on action, but to avoid multiplicity of actions I will not object.

The Court considered that the matter could not be decided on affidavit, and postponed the application until August 19, and granted leave to both parties to produce oral testimony on the points raised.

Postea (August 19th), the following evidence was led.

Benjamin Duminy, law agent, residing at Durbanville, said he had had considerable experience in drawing up wills. He drew up the will of Adam van Niekerk. He had known the testator, Adam van Niekerk, for many years. When he drew up the will Adam van Niekerk was in bed, and there were several others in the room. He was quite satisfied that he was of sound mind. The testator fully explained his wishes with regard to the property, and he (witness) reduced it to writing, after which he fully explained the contents of the will to Van Niekerk, who made a cross. He did not leave the will with the testator, because he would not pay him for his trouble, so he took it with him to Durbanville. Two days later Lodewyk van Niekerk and Salie Jacobs called for the will. He confirmed the evidence he had given in affidavit.

In cross-examination: The testator was a very old man. He had known him since his youth. He wrote the name of Salie Jacobs to the will whilst he (Jacobs) held the top of the pen all the while. Salie Jacobs could not write.

Salie Jacobs said he went to the farm of Adam van Niekerk in company with the last witness for the purpose of writing his will. The testator said the farm should go to his two sons, and the movable property to his daughters. He corroborated the evidence of Duminy and his own statement on affidavit.

The witness and Duminy gave a practical illustration of the manner in which the name of the former had been written.

Corroborative evidence was given by L. S. van Niekerk.

Dr. Roux, district surgeon of Malmesbury, said that he knew the testator well, and performed an operation on him on the 15th September, when he was certainly of sound mind, and quite capable of making a will. He did not see the testator after that date.

Dr. Murray, of Durbanville, gave corroborative evidence. On the 6th November, when the testator made his will, he was of sound mind, and quite capable of doing so. He put several questions to the testator with regard to the disposition of his property.

The Rev. Mr. Luckhoff, minister of the Dutch Reformed Church at Durbanville, deposed to visiting the testator in October. At the time his mind was quite sound.

N. F. van Niekerk gave corroborative evidence.

For the respondent, Jacobus Loubscher, who lived on the next farm to the testator, stated that he had known Adam van Niekerk for many years. He visited him a short time before the will was made, and thought he was not in a fit condition to make a will. He was quite childish.

Salie Dollie said that Van Niekerk was very weak a week before his death and the sons said that when he got better they would get him to make his will.

J. H. Hofmeyr, notary and attorney, said that in April, 1897, the testator visited his office and talked about making a will to disinherit some of the children.

Constant van Niekerk, a lime burner, of Somerset West, said he visited his father, the testator, a short time before he made his will, and found him very weak in mind and body.

Mr. Currey: There is a distinction in Ordinance 15 of 1845 between the requisites of a testator's signature and that of a witness. The English Courts as well as those of the Colony have allowed a signature by mark but they have never gone so far as to allow a signature to be made by another person while the tip of the pen is held by the person whose signature is written. It has been held in England that a person can sign by having his hands guided, but they must be guided all the time. *In the Goods of Frith* (27 L. J. Prob., p. 6): *In the goods of White* (2 Notes of Cases, p. 461); *In the* Poods *of Lerington* (11 P. D., p. 80): *In the Goods of Cope* (2 Robert. p. 335). *In the Goods of Kilcher* (6 Notes of Cases, p. 15) where the two attesting witnesses held the tip of the pen whilst another person wrote their names, Sir H. G. Fust rejected the motion for probate and said that where a person's hand is guided the act is his own, but that here another person signed the names of the witnesses.

[De Villiers, C.J.: Was not that a case where the witnesses were able to write?]

That is so. But Salie Jacobs was able to make his mark and might have done so. He did not guide the pen.

[De Villiers, C.J., referred to *Re Lewis Lewis* (31, L.J. (N.S.) Probate, p. 153).]

Mr. Schreiner: There is less real attestation in making a cross than in holding the pen while the holder's name is written. That is different to what is generally called touching the pen, which is a mere touching before the name is written. *Kilcher's* case does not bind the Court.

De Villiers, C.J.: On the face of the document in suit there is such an irregularity that the Master was justified in putting the applicants to the proof that it was duly executed as a will. The first page is signed with the mark of the testator duly attested by two witnesses, but at the foot of the will the name of the testator, appearing after his mark, is struck out and, in addition to the two witnesses who subscribed the first page, there is a third witness who is one of the heirs under the will. Without a full and satisfactory explanation of this irregularity it would have been dangerous to accept the document as a genuine will, but it is clear from the evidence that the irregularity was introduced some days after the execution through the bungling of the person who had drawn the will. The Court is satisfied that the will was signed at the foot or end thereof by the testator with his mark in the presence of the two witnesses Salie Jacobs and Ben. Duminy, who were present at the same time. The Court is further satisfied that the signatures of these two witnesses were made in the presence of the testator, that Ben. Duminy wrote his own name with the object of attesting the will, and that he also wrote the name of Salie Jacobs, whilst Salie Jacobs, who could not write, was holding the pen at the top with the object of thus attesting and subscribing the will. The Court is lastly satisfied that Ben. Duminy, who had drawn the will, drew his pen through the testator's name some days after the will had been executed without the testator's knowledge or consent and that he then also induced the third witness, L. J. van Niekerk, to sign the will. His thus tampering with the will, out of sheer stupidity, after the will had been made, cannot affect its validity and the real question to be determined is whether Salie Jacobs can be held to have duly attested and subscribed the will. He only held the pen at the top whilst Ben. Duminy wrote his (Salie Jacobs) name and therefore, it is said, the signature was really made by Ben. Duminy. There is some force in the argument, but it would be very difficult for the Court, in inquiries of this nature, to decide what share each of the persons holding the pen had in making the signature. If Salie Jacobs had been a person who could write there might have been some difficulty in upholding the *bona fides* of the transaction, but he was wholly unable to write his own name. He therefore took the only part that he was capable of taking in the writing of his name, that is to say he held the top of the pen while Ben. Duminy wrote the name. It must be admitted that the whole transaction demands the closest scrutiny. If after such scrutiny the *bona fides* of the parties is established and it is proved that Salie Jacobs took some part, however small, in writing his own name, the Court should uphold a will which, according to the evidence, expresses the genuine wishes of the deceased. Mr. Currey has cited the case of *In re Kilcher* (6 Notes of Cases, p. 15), but that was a case in which the witness who held the top of the pen was himself able to write. In the subsequent case of *Lewis Lewis* (31 L. J., N. S., Prob. 153) the question was whether the attesting witnesses, who could not write, had duly attested the will by holding the pen at the top whilst another person guided it and wrote their names. "I think," said Sir Creswell Creswell, "that each of the witnesses, by holding the pen, was taking some share in the act of writing his name, and I cannot discriminate the *quantum*. I think therefore that the subscription is good and that probate of the will should be granted."

A further objection has been raised in the present case that the testator was not of a sound disposing mind at the date of making the will, but the evidence of the two doctors and the clergyman entirely disposes of the objection.

The rule must be made absolute and the costs of both parties must be paid by the estate, with the exception of the expenses of the witnesses called as to the testator's state of mind, which must be paid by the respondent.

[Applicant's Attorneys, J. C. Berrange & Son: Respondent's Attorney, V. A. van der Byl.]

OLIFF V. WORCESTER MUNICIPALITY.

1898.
July 13th.
Aug. 1st.

Municipal regulations—*Ultra vires*—Covering drain Costs—Private prosecution.

A Municipal Council established under Act 45 of 1882 has no power to make a bye-law compelling every householder from whose premises drainage water lawfully flows by a furrow into a public drain to provide a covering for such furrow on municipal land.

This was an appeal from the conviction of the appellant by the Resident Magistrate of Worcester upon a summons issued at the instance of Daniel Jacobus Roux charging the appellant with a contravention of Regulation No. 33 of the Worcester Municipality in failing to provide and erect covering for a certain private drain discharging itself into the public drain in Church-street, where it intersects the sidewalk, such private drain serving the purpose of certain premises, being part of Erf No. 4, Block H, owned or occupied by the appellant.

The appellant pleaded not guilty, and put in the following special plea:

1. That the drain has existed from time immemorial and long previous to the regulation in question, and serves also the properties of Miss Jordaan and Mr. G. N. Hamman, and that where it passes over municipal ground it never was covered.

2. That the part complained of as being uncovered is on municipal ground and within the defined boundaries of the street and absolutely under municipal control.

3. That about two years back the Municipality altered the course of the public drain in Church-street, placing it about three feet further into the street, thus leaving about twenty feet between the boundary of the private properties and the public drain, and it is now sought that defendant should be compelled to cover what they left open on their ground.

4. That the municipal regulation No. 33, which provides for private individuals to be forced to do work on municipal ground, is *ultra vires*.

Daniel J. Roux, streetkeeper, gave evidence to the effect that the drain in question was uncovered on the 1st June last, and still was uncovered.

Cross-examined: He admitted that it had been open as long as he could remember. He was forty-four years old, and had lived in Worcester since his seventh year. The drain was also used by Miss Jordaan and Mr. Hamman, the adjoining proprietors. There were many inhabitants who had refused to comply with the regulation in question. The regulations were framed in April, 1897.

The defendant gave evidence in support of his plea.

The portion of Regulation No. 33 under which the charge was laid was as follows: "Every proprietor or occupier of any erf or bit of ground over whose premises a private drain exists, and which discharges itself into any public drain, and whether such private drain serves the requirements of such proprietor or occupier. either solely or jointly with any other proprietor or occupier or not. shall similarly be bound to provide, erect, and maintain in good order and position sufficient and substantial covering for such drain where it intersects the side-walk for a distance of not less than 8 feet. calculated from the public drain, and shall properly pave and maintain in good order the whole extent of such private drain from the boundary of the premises to the public drain ; and any person not conforming to this regulation shall be liable to a penalty not exceeding two pounds sterling for such contravention."

The Magistrate found the defendant guilty, and fined him two shillings and sixpence.

Mr. Schreiner. Q.C.. for the appellant: Oliff has a prescriptive right to the discharge from his drain into the public drain. Regulation 33 is *ultra vires*. The Municipality has no power to make a private individual go upon public property and cover a public drain for the benefit of the public and other private persons. The spirit of Act 45 of 1882 is shown by section 109. subsection 23: it is clear from that that it was not intended to interfere with private rights.

The appellant is charged with a nonfeasance; there is no principle for such a charge; if fined once he can be fined every day: there is no complaint that his drain is unlawful. Under section 156 the Municipality has power to make and construct sewers. &c.. and keep them in repair: this power was discussed in *Jordaan* v. *Worcester Municipality* (10 Juta, p. 159), and it was there held that no damages would accrue through non-feasance.

Mr. Innes. Q.C.. for the respondents: Under section 109. sub-section 7 of Act 45 of 1882. the Municipality has power to make bye-laws regulating sewerage or drainage. Clearly it might say that drainage shall only be passed through a pipe: what it does say is that it must be discharged through a covered drain. In the converse case of water being led out of a public furrow, the Municipality might say that it should not be led out except by a covered furrow.

[De Villiers, C.J.: Is there any instance of a regulation being held valid which imposes on a person a duty to do something, and moreover to do something on municipal lands ?]

I cannot find any reported case in point There are instances under the Cape Town Municipal Act regarding the laying out of new properties and streets. The chief object of the Municipality in appearing is to oppose the application for costs.

Mr. Schreiner. Q.C.: The costs of appeal have been allowed in a criminal case although the costs in the Court below have not. *Snyders* v. *Theron* (10 Juta, p. 309). These proceedings are not criminal but civil, inasmuch as a fine only is imposed and that has to be paid into the municipal fund. *Voet* (5, 6, 1). In *Regina* v. *Thesen* (6 Juta, p. 68) it was held that costs could be allowed in a a private prosecution. The prosecutor here is private person. Daniel Roux; no capacity is stated. The action is what is known in English law as a *Qui tam* action: *Whiteman* v. *Beaconsfield Municipality* (5 H.C.R., p. 296); *Pickering* v. *Kimberley Town Council* (2 H.C.R., p. 374): *Graham's Town Municipality* v. *Pote* (5 E.D., p. 81); *Visagie* v. *Booysen* (2 R., p. 48).

Mr. Innes. Q.C.: It is a criminal matter. *Snyders* v. *Theron* (10 Juta, p. 309).

[De Villiers, C.J.: In *Barling* v. *Town Council of Cape Town* (1875, p. 101) the appeal was dismissed with costs.]

I admit that it is in the discretion of the Court, but the principle is that the Court will not allow costs unless the proceedings are vexatious or unfounded. *Graham's Town Municipality* v. *Pote* (5 E.D., p. 81.)

Postea (August 1st).

De Villiers, C.J.: This is an appeal against a conviction and sentence by the Magistrate's Court of Worcester for a contravention of the 33rd Municipal Regulation. The concluding part of that regulation provides that "every proprietor of any erf over whose premises a private drain exists which discharges itself into any public drain shall be bound to provide, erect, and maintain in good order and position sufficient and substantial covering for such drain where it intercepts the sidewalk for a distance of not less than eight feet, calculated from the public drain, and any person not conforming to this regulation shall be liable to a penalty not exceeding £2 for every contravention." For upwards of thirty years drainage water has flowed from the appellant's premises in a furrow over municipal land into a public drain, which is about twenty feet from the appellant's boundary. His right to discharge the drainage water from his land over municipal land into the public drain is not denied, nor is it alleged that he has committed any nuisance which should be suppressed. The contravention with which he was charged was his failure to provide and erect a covering for the furrow, where it intersects the municipal sidewalk. He was convicted and sentenced to pay a nominal fine, and it is in order to test the validity of the regulation in question that the present appeal is brought. The Municipal Regulations of Worcester were framed under Act 45 of 1882, the 109th section of which empowers the Council to frame bye-laws for several Municipal purposes including the regulating of drainage and the suppression of nuisances. In the present case there was no nuisance to suppress, and if the bye-law is valid it must derive its validity from the power to regulate drainage. Does this power include a power of compelling householders to provide coverings for lawfully existing drains on municipal land? In my opinion it does not. The Council itself has ample power and authority under the 156th section of the Act to construct, alter, keep clean and in repair all drains within the Municipality. The Council may of course refuse to allow any fresh drain to be made on municipal property except on conditions, and may suppress nuisances caused by existing drains, but it has no power to frame a regulation having the effect of casting on householders the duty of doing work for the Municipality on municipal ground. It is not a question whether the regulation is a reasonable one. I confess that I have always been loth to apply the test of reasonableness in order to ascertain the validity of bye-laws framed by elective bodies for the communities which they represent. But the test of reasonableness may well be applied to the construction of the Statute which empowers the making of the bye-laws. It would not be a reasonable construction of the expression "regulating drainage" to include within it the wide power claimed by the respondents. Work for regulating drainage on municipal land should be performed in the manner in which all ordinary work on municipal land is performed, and that is by the Council itself, and I can find nothing in the Act which would justify the exercise of a power compelling any person to perform such work for the municipality. The appeal should, in my opinion, be allowed, and the next question is whether the appellant should have his costs. Seeing that the prosecution was a private one, that under the Act fines must be paid into the municipal fund, and that the question to be decided was essentially a matter of private right, I consider that costs should follow the result.

[Appellant's Attorney, V. A. Van der Byl: Respondent's Attorneys, Messrs. van Zyl & Buissinné.]

SUPREME COURT

(IN CHAMBERS).

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice BUCHANAN.

Re THE METROPOLITAN AND SUBURBAN RAILWAY COMPANY, LIMITED. } 1898. July 20th.

This was an application by several creditors of the Metropolitan and Suburban Railway Company for a winding-up order.

The petition of Mr. Daniel Fredrik Berrangé was as follows: That the Metropolitan and Suburban Railway Co. (Limited) is justly and truly iddebted to your petitioner in the sum of £2,000 sterling awarded to your petitioner as damages on March 3, 1898, and for which said sum your petitioner obtained judgment with costs. That the said company has repeatedly admitted to your petitioner its inability to satisfy the said judgment. That the said company has given notice to the public that they have suspended the service, as the Colonial Government has withdrawn the rolling-stock which the said company had in use as they are unable to pay the charge made by the Government for the hire of the said rolling-stock, and as a fact the service on the company's line has been suspended. That the said costs have as yet not been satisfied in full. That your petitioner holds no security for the said indebtedness. Wherefore your petitioner prays that the company be wound up under the provisions of the Companies Act, 1892.

The petitioner further asked for the appointment of Messrs. Syfret and Gibson as liquidators and of Messrs. J. C. Berrangé & Son as attorneys.

The petition of Messrs. John Walker and Geo. Barker was as follows: (1) That your petitioners are creditors of the Metropolitan and Suburban Railway Company (Limited) for the amounts set opposite their respective names, whilst the first-named petitioner is likewise a shareholder in the said company to the extent of 10,292 shares; (2) part of your first-named petitioner's claim consists of the sum of £27,500, which was secured by general bonds or debentures, and which he values at the sum of £27,500, while part of your second-named petitioner's claim consists of the sum of £4,000, which was secured by general bond or debentures, and which he values at the sum of £4,000; (3) that besides the amounts due to your petitioners, the said company is owing the Colonial Government the sum of £2,401 16s. 2d., the hire of rolling-stock and stores, and D. F. Berrangé the sum of £2,000, the amount of a judgment; (4) that the assets of the said company consist of the sum of £77 odd, being the credit balance with the African Banking Corporation, and the railway line between Cape Town and Sea Point, with the buildings in connection therewith; (5) that the said company is unable to meet its liabilities; (6) that the said company is unable to continue its business, and it is necessary that the same should be placed in liquidation.

JOHN WALKER, £37,100 13s. 2d.
GEORGE BARKER, £4,800.

The petitioners asked for the appointment of Messrs. Steytler and Tonkin as liquidators and Mr. Gus Trollip as attorney.

Mr. Gardiner appeared for Mr. Berrangé, and Mr. Close appeared for Messrs. John Walker and George Barker.

De Villiers, C.J.: It was quite clear that the order must be granted. The Court will make the order, and appoint Messrs. G. W. Steytler and H. Gibson liquidators. The costs of both applications will be costs in the liquidation. The liquidators will be required to find, jointly and severally, security to the amount of £10,000. As to the appointment of an attorney it is not the practice for the Court to make the appointment. The law requires it to be made by the liquidators.

[Attorneys for D. F. Berrangé, Messrs. J. C. Berrangé & Son; Attorneys for Walker and Barker, Gus. Trollip.]

SUPREME COURT

(IN CHAMBERS.)

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice BUCHANAN.]

Re THE CAPE OF GOOD HOPE PERMANENT BUILDING, LAND, AND INVESTMENT SOCIETY. { 1898. July 21st.

This was an application by the chairman and directors of the Cape of Good Hope Permanent Building Land and Investment Society for a winding-up order.

The petition was as follows: 1. That the Cape of Good Hope Permanent Building, Land, and Investment Society was established in 1877. 2. That in August, 1897, the said society was registered as a limited liability company under the provisions of the Companies Act of 1892. 3. That in April, 1898, certain defalcations made by the secretary of the society were discovered, and at a meeting of shareholders and depositors held on May 5, 1898, Messrs. G. W. Steytler and Harry Gibson, together with the auditors of the society, were appointed as special auditors to inspect the books, securities, and accounts of the society, and to report thereon. 4. The said auditors have since reported that defalcations to the extent of £37,057 sterling have been traced, and that the financial position of the society is as follows: Liabilities—Defalcations, £37,057; deposits, £44,364; overdraft at bankers, £4,242; total, £85,603. Assets—Mortgage bonds, £49,905; landed property, £10,228; total, £60,133; leaving a deficiency of £25,530 to be provided for. 5. That in consequence of the large amount of defalcations as aforesaid the society is wholly unable to meet its liabilities, and it will be to the interest of shareholders, depositors and all concerned, that the said society should be wound up, under Act No. 25 of 1892, and that official liquidators should be appointed to liquidate the said society. Wherefore, your petitioners pray that your lordships may be pleased to grant an order: (*a*) That the said society be wound up under the provisions of Act No. 25 of 1892; (*b*) Appointing Messrs. George William Steytler and Harry Gibson as official liquidators, with authority to exercise all powers contained in section 148, Act No. 25 of 1882, without the sanction or intervention of the Court.

Mr. Innes, Q.C., appeared for the applicants and said that there was a further prayer asking the Court to sanction the appointment of an attorney to the liquidators; but he gathered from what their lordships had said yesterday, that such an application should come from the liquidators. He would therefore not ask for an order on that prayer.

De Villiers, C.J.: There has been no resolution requiring the winding up of the company by the Court.

Mr. Innes: There has been no such resolution as the Act contemplates. There has been a resolution, but not a special resolution as required by the Act passed by a certain majority of the shareholders after certain notice stating that it would be proposed and confirmed by a subsequent meeting. It appears to be the unanimous opinion of all concerned that the best course is to wind up the society.

De Villiers, C.J.: The question is whether there is likely to be any opposition if the Court were to delay the matter and make a provisional order.

Mr. Innes: I am not aware of any opposition. There has been an informal meeting.

The order was granted as prayed, the costs to be costs in the liquidation.

Mr. Innes asked what order would be made as to the security to be given by the liquidators.

The Chief Justice said that the liquidators were both secretaries of trust companies, but still it would be better to fix some amount, say £10,000, as security. The security of the companies would be sufficient.

[Applicant's Attorney, P. de Villiers.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

MAGISTRATE'S COURT CASE REVIEWED.

The Chief Justice mentioned a case which had come before him from Clanwilliam for review. Two prisoners were charged with theft, and pleading guilty, were each sentenced to three months' imprisonment with hard labour and fifteen cuts with the cane. There was a previous conviction against one of the prisoners but none against the other, consequently in his case the sentence of fifteen cuts with the cane must be expunged.

ADMISSIONS.

Mr. Benjamin moved for the admission of Lancelot D'Eyncourt Miller as an advocate of the Court.

The order was granted and the oath administered.

Mr. Benjamin moved for the admission of William Hasten Dickinson as a conveyancer of the Court, and asked that oath might be taken before the British Agent at Pretoria.

The order was granted as prayed.

REHABILITATIONS.

Mr. Upington applied for the rehabilitation of the estate of Jasper Smit Faculyn Gous, whose estate was voluntarily surrendered on June 2, 1886.

Order granted.

Mr. Currey applied for the rehabilitation of the estate of Jan Andries Rabe, whose estate was sequestrated on May 11, 1894.

Order granted.

Mr. Jones moved for the rehabilitation of the estate of Christian Gotlieb Hartman, which was sequestrated on September 4, 1882.

Order granted.

Mr. Innes, Q.C., moved for the release from sequestration of the estate of James Roberts under section 106 of the Insolvent Ordinance, or alternatively for his rehabilitation.

Rehabilitation ordered.

PROVISIONAL ROLL.

TOE v. JOLLY.

Provisional sentence—Stay of execution.

Where the plaintiff sued upon a liquid document, but the defendant set up a counterclaim, the Court granted provisional sentence but stayed execution for one month in order that an action might be brought if desired.

Mr. De Waal applied for provisional sentence for the sum of £10 on an I O U dated July 2, 1898, with costs.

Mr. Close appeared for the defendant. The defendant filed an affidavit alleging that the £10 was paid on account of a share transaction between plaintiff and himself, the former having purchased from him shares valued at £250, the scrip for which had been duly tendered.

In an answering affidavit the plaintiff denied that the £10 had anything to do with the alleged share transaction, the money being advanced to defendant at his special request, as he said he was in need of cash on that day. The money was advanced in the Criterion Hotel, Cape Town.

De Villiers, C.J.: I would have thought that if the money had been paid on account of the share transaction a receipt would have been given instead of an I O U.

After argument,

De Villiers, C.J., said: *Prima facie*, there is this debt of £10 on the I O U, but it is quite possible that what the defendant says as to the share transaction is quite true. The defendant, however, says that the I O U was given in mistake for a receipt, but on the face of it, that seems unlikely. As, however, it is possible that the defendant may have a counter claim, an injustice might be done if execution were allowed to take place forthwith. The Court will give provisional sentence for the £10, but execution will be stayed for one month, so that an action can be brought if desired. Costs of the present action will be costs in the cause.

MILLS V. BARKER.

Mr. Buchanan applied for provisional sentence on a promissory note for £200, value received, signed by Joseph Barker and Emma Sophia Barker. He only asked for judgment against the second-named defendant. He also asked that certain property which had been attached to found jurisdiction should be declared executable.

Order granted.

VAN RIET V. LINDSAY.

Mr. Buchanan applied for provisional sentence for the sum of £20 on certain conditions of sale, with interest in terms of the said conditions of sale.

The defendant appeared personally and denied liability, contending that, acting in conformity with the conditions of sale, he returned the property to the plaintiff to be re-sold at his (defendant's) expense. The defendant pointed out that the conditions of sale were to the effect that in case the purchaser should fail to pay the purchase price the ground should be put up and resold at the expense of the defaulting purchaser.

De Villiers, C.J.: That is a proviso for the benefit of the seller, which he can waive if he thinks fit.

Provisional sentence was granted as prayed.

FAIRBRIDGE'S EXECUTORS V. VAN DEN HEEVER AND OTHERS.

Mr. Currey applied for provisional sentence for sums of £500, £206, and £75, secured by mortgage bonds, less certain amounts paid on account.

Provisional sentence granted as prayed.

LOUW V. CHRISTIAN BRUYNS.

Mr. Buchanan applied for the final adjudication of the defendant's estate.

Order granted.

AFRICAN BANKING CORPORATION V. JOHN CHARLES WARREN.

Mr. Maskew applied for the final adjudication of defendant's estate.

Order granted.

ILLIQUID ROLL.

WELCH V. GLASGOW.

Mr. Maskew applied, under Rule 319, for the cancellation of the sale of certain land and forfeiture of the amount paid on account of the purchase price in accordance with the conditions of sale. The land consisted of two lots of ground at Woodstock, and the sale took place on August 25, 1892. The purchase price was £17, and defendant paid £3 of that amount, after which he disappeared.

Order granted.

LONGWORTH AND CO. V. LOUIS MOSS.

Mr. Close applied, under Rule 329, for judgment for £93 1s. 4d., goods sold and delivered, interest, and costs of suit.

Order granted.

GARLICK V. W. A. WOODBURN.

Mr. Upington moved for judgment under Rule 329 for the sum of £21 14s., goods sold and delivered, work and labour done, with interest *a tempore moræ*, and costs of suit.

Order granted.

ROSENTHAL V. ELIZABETH CARNEY.

Mr. Benjamin applied, under Rule 329, for judgment for the sum of £3,100, less £1,450 paid on account, being purchase price of certain property.

Order granted.

MORRIS V. ELIZABETH CARNEY.

Mr. Benjamin applied, under Rule 329, for judgment for the sum of £1,600, less £750 paid on account, purchase price of certain property.

Order granted.

W. AND G. SCOTT V. JOHAN J. G. VAN DER BYL.

Mr. Gardiner applied, under Rule 329, for judgment for the sum of £294 5s. 10d., due by defendant for goods sold and delivered, with interest *a tempore moræ* and costs.

Order granted.

GENERAL MOTIONS.

SPRECKLEY V. SPRECKLEY.

Mr. Benjamin applied for a rule *nisi* for leave to sue *in forma pauperis* for a restitution of conjugal rights. The defendant had left for Johannesburg in 1894, and had last been heard of in 1896.

Order granted; personal service to be effected.

PETITION OF MELK VAN DER SPUY VERSFELT.

Mr. Joubert moved that a rule *nisi*, granted under the Derelict Lands Act, be made absolute. Counsel stated that the applicant's attorneys had received from Mr, O'Reilly, the trustee in the estate of one Brookman, a letter objecting to the rule being made absolute, on the ground that Brookman had at one time purchased the property in question.

The matter was ordered to stand over until August 18, and in the meanwhile notice to be given to the trustee in the estate of Brookman, so that an action might be brought if it was thought worth while.

Postea (August 18th.)

The rule was made absolute.

PETITION OF SIEBERT JOHANNES WIID.

Mr. De Waal moved that a rule *nisi*, granted under the Derelict Lands Act, be made absolute.

Order granted.

PETITION OF JACOBUS NICHOLAS BOSHOFF.

Mr. De Waal moved that a rule *nisi*, granted on the 13th June in connection with the cancellation of a certain bond, be made absolute.

Order granted.

IN THE MATTER OF THE MINORS DU PLESSIS

Mr. Close moved for an order authorising the Master to make certain payments towards the education and maintenance of the minors.

An order was granted in terms of the Master's report.

IN THE ESTATE OF THE LATE BAREND PIETER DU PLESSIS.

Mr. McGregor moved on behalf of the executors in the estate for an order authorising the sale of certain property in which minors were interested. An offer had been received of £10,000 for the property, and the Master considered that it would be in the interests of the minors to accept that offer. It was proposed to purchase other property with the proceeds of the sale.

The Court granted the order, and directed that the amount to be spent in the purchase of a new building should be to the satisfaction of the Master.

IN THE MATTER OF WILLIAM CAIRNCROSS AND OTHERS.

Mr. Buchanan asked that a certain award made by arbitrators be made a rule of Court.

Granted.

IN THE MATTER OF THE METROPOLITAN AND SUBURBAN RAILWAY COMPANY, IN LIQUIDATION.

Mr. Innes, Q.C., applied on behalf of the liquidators for an order confirming the appointment of Mr. J. C. Berrange as their solicitor.

Granted.

BATTENHAUSEN AND WOLFF V. DOUGHERTY.

Mr. Buchanan applied for leave to attach certain property *ad fundandam jurisdictionem*, and to sue by edictal citation in an action about to be brought for the recovery of £500 due on a mortgage bond.

Order granted.

IN THE ESTATE OF THE LATE GABRIEL JACOBUS CROUSE.

Mr. Benjamin applied on behalf of the heirs in the said estate for leave to mortgage their shares of certain parts of the estate in order to liquidate the deceased's debts. The will prohibited the heirs from selling or mortgaging their shares. The executrix in the estate, the surviving spouse, had intimated her willingness to transfer the property to the children (the heirs in the estate) if the order was granted.

De Villiers, C.J., said that he thought the better course would be to give leave to the executrix to mortgage the property for the purpose of paying the debts in the estate. An order would therefore be made authorising her to raise £250 on a further mortgage on the property for the said purpose.

WEBER V. WEBER.

Mr. Currey applied on behalf of Mary Ann Weber for a decree of divorce against her husband Frederick W. Weber, he having failed to comply with the order of Court to restore conjugal rights to applicant.

Order granted.

IN THE MATTER OF THE MINOR ROZA HERMINA VAN SCHALKWYK.

Mr. Sheil, Q.C., applied for the appointment of a *curator ad litem* in the above matter, to act for the minor in an action about to be brought against the trustees in an insolvent estate in connection with the minor's inheritance. It was contended that her claim against the insolvent estate was £369 12s., but the trustees only admitted a claim of £40.

The order was granted, and Mr. Sheil was appointed *curator ad litem.*

WELT V. WELT.

Mr. Benjamin presented the report of the receiver appointed in this matter, and it was accordingly confirmed.

INSOLVENT ESTATE OF WARREN AND OSBORNE.

Mr. Jones moved for an order giving to C. Watts Mouatt, the provisional trustee in the above estate, full power to wind up the estate.

The application was made in consequence of a disagreement among the creditors at the second meeting in the estate as to the appointment of a trustee. Two candidates were proposed, but neither received a majority of votes in number and value.

The application was granted.

BENNING V. TOWN COUNCIL OF CAPE TOWN.

1898.
Aug. 1st.

Municipal regulation—Builder—City Engineer's certificate—Costs.

The 117th Municipal Regulation of Cape Town provides that no new building shall be occupied until the City Engineer has certified that it is in accordance with the regulation.

Held, *that the builder of a new building who does not prevent the owner from occupying without such a certificate cannot for that reason be charged with a contravention of the regulation.*

This was an appeal from the conviction of the appellant by the Assistant Resident Magistrate of Cape Town for the contravention of No. 117 of the Municipal Regulations, in that on or about the 10th June he having erected a building on the Military-road, Tamboer's Kloof, did wrongfully and unlawfully allow the said house to be occupied before the City Engineer had, in accordance with the said section, granted a certificate that the said building was in accordance with the said regulations. Regulation 117 was in the following terms: "Every person who shall erect a building shall within a reasonable time after the completion of the erection of such building deliver or send, or cause to be delivered or sent, to the City Engineer at his office notice in writing of the completion of the erection of such building, and shall at all reasonable times, within a period of four working days after such notice shall have been so delivered or sent afford the City Engineer and his duly authorised assistants free access to every part of such building for the purposes of inspection; and the City Engineer shall inspect the same within such period, and if in accordance with the regulations, he shall grant a certificate to that effect, and if not in accordance therewith he shall within the said period specify the alterations which he requires to be made. No new building shall be occupied until such certificate has been granted."

The building inspector gave evidence of the occupation on the 10th June, and that no application to have the building inspected and passed for occupation had been made. The certificate for occupation had not passed through the Council's books.

The appellant stated in evidence that the property belonged to a Mrs. Gable, and was registered in her name, and that he had built it for her in accordance with plans passed by the Town Council. He said he had complied with Regulation 117 as far as granting free access to inspection. When the places were passed he received four slips showing the different stages which the building had reached. (These slips were notices to be sent to the City Engineer by the person erecting any building stating that it was completed andready for inspection.) About May 28 the building was occupied by the owner herself. About fourteen days before this he had sent in the notice of completion. He had left it on the desk of the clerk of the works in the usual way. No objection was made by the Town Council as far as he knew. No inspection was made on the notice.

James Russell stated that he was building inspector to the Town Council up to the 15th May. The work was finished to his satisfaction before he left, with the exception of painting and papering. He believed notice of completion had been sent in. In cross-examination he said: I can swear defendant sent in notice of completion.

Mr. Innes, Q.C., for the appellant. The evidence is not satisfactory. The City Engineer's evidence should have been taken. Within four days from the time the notice has been sent the City Engineer should inspect: if he does not then the presumption is that he has no objection to its occupation. In any case the person liable is the owner of the property and not the contractor: the contractor has no control of the property.

Mr. Schreiner, Q.C., for the respondent.

The Council is not able to follow the property through different hands; it knows the builder and no one else. It was the applicant's duty to see that the Council received the notice. The builder has the control of the building and must see that the regulations are observed. There is nothing to show that there is any proprietor but himself.

[De Villiers, C.J.: The notice put in refers to No. 202 of the old Regulations, which provides that the builder shall send these notices.]

Both the regulations give definite information as to the way in which the notices are to be sent.

Mr. Innes: The record shows that Mrs. Gable is the owner of the property. Even if the Council believed the appellant to be the owner, the most they could look to him for was that he should send in the notices of completion. But for unauthorised occupation they can only penalise the actual occupier or the person who is able to prevent the occupation.

De Villiers, C.J.: The charge against the appellant was that he wrongfully and unlawfully allowed the house in question to be occupied before the City Engineer had, in terms of the 117th Municipal Regulation, granted a certificate that the building was in accordance with the regulation. It was proved that the appellant was the builder for the registered proprietor of the land, and that he did nothing to prevent the proprietor from taking occupation of the house on its completion. The regulation provides that "no new building shall be occupied until such certificate has been granted," and the question is, whether the appellant can be held to have occupied the house or caused it to be occupied. In my opinion a builder who does not prevent the owner from occupying the building before the City Engineer's certificate is given, cannot be held to have either occupied the house or caused it to be occupied. But the respondent's counsel contended that as the plans for the erection of the building had been sent in to the Council by the appellant, and are signed by him as proprietor, he is liable under the section. The plans were not produced in the Court below, and there is consequently no proof that they were signed by the appellant, but even if they had been so signed the circumstance would not have affected the case. A representation made by the appellant to the Council that he is the owner does not constitute him the owner or occupier in terms of the regulation. The fact that he occupied the house had to be proved, and an admission that he was the owner might have furnished some proof of his occupation, but it was not conclusive in face of the clear evidence to the contrary. In a criminal case such an admission cannot be allowed to operate as an estoppel so as to exclude evidence that he was only the builder and not the owner. The appeal must be allowed with costs.

Mr. Schreiner: This is a public prosecution. The summons is in the name of the Town Council "who prosecute in the name of Her Majesty the Queen." The police then appeared and conducted the case.

[De Villiers, C.J.: To whom do the fines go? To the Town Council.]

Mr. Innes: If that argument is good, the Town Council could in all cases save costs by putting in those words. *Regina* v. *Thesen* (6 Juta, p. 68).

De Villiers, C.J.: There is no reason for departing from the usual course that costs should follow the result. The prosecution is not a public one.

[Appellant's Attorney, Mr. A. Kenealy; Respondents' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

SLOAN—OTHERWISE BLEKSLEY v. SLOAN. } 1898. Aug. 2nd.

This was an action for a decree of nullity of marriage.

Mr. Currey appeared for the plaintiff.

Francis Henry le Sueur, clerk in charge of the marriage registers in the Colonial Office, produced the certificate of the marriage between Alice Mary Bleksley and John William Sloan.

Alice Mary Bleksley, a nurse, residing at 49, Roeland-street, Cape Town, deposed that she was the plaintiff in this case. She first met Sloan in the year 1884, and he went through a ceremony of marriage with her on October 5, 1888. Neither of them had any property. Witness was then twenty years of age. Her father was dead, but her mother was alive, and consented to the marriage. There were no children of the marriage. At the time of the marriage witness had not the least idea that Sloan was a married man. After their marriage they lived in Reform-street, Cape Town, for fifteen months, after which they went to live at Salt River. She first had suspicions that Sloan was a married man while they were living in Reform-street, and those suspicions were confirmed by documents she became possessed of in 1890, while they were residing at Salt River. She then left defendant. That was on May 27, 1890. They had never cohabited since, and she had not since then received any money from him. She only brought the action now as she had to wait until a friend, who went to reside in the Mauritius, got sufficient evidence. When she lived with Sloan her life was a very unhappy one, but she was a faithful and true wife.

De Villiers, C.J. (to the defendant, who was in court): Do you admit that your wife was alive when you married this lady?

Defendant: Yes, my lord.

De Villiers, C.J.: Do you wish to put any questions to her?

Defendant: No, my lord.

John William Sloan, the defendant, deposed that he was by birth an American. At present he resided at Rondebosch and was a carpenter by trade. In 1870, he went to Mauritius, and in 1871 married one Marie E. Modeste. He lived with her until 1881 or 1882, when he left Mauritius on account of sickness. He remained in Natal until 1884, when he came to this colony. On October 5, 1888, he went through a ceremony of marriage with Alice Mary Bleksley. Twelve months previous to that he had been informed that his wife had divorced him. He knew now that his wife did not divorce him until 1894. He had read the judgment of the Supreme Court of Mauritius in the matter of Sloan v. Sloan, dated August 7, 1894. He was the defendant referred to in that judgment.

The judgment referred to, which was for divorce on the ground of desertion in a suit brought against the present defendant by his former wife, was put in.

De Villiers, C.J. (to defendant): Was there a rule served upon you before this final divorce was granted?

The defendant said that no rule was served upon him.

De Villiers, C.J.: Have you any children by your former wife?

Defendant: None whatever, my lord.

The Court granted a decree as prayed, costs not being pressed for.

[Plaintiff's Attorney, D. Godlonton.]

STEENKAMP V. KYD.

1898. Aug. 2nd.

Inderdict.

K. *instituted an action for damages against* S. *in a Magistrate's Court. While the action was pending, on the application of* K. *representing that* S. *was expecting to receive a certain inheritance in a short while, and that it was feared that before the termination of the action he would remove his property, with the result that nothing would be left to satisfy* K.'s *claim, the Magistrate interdicted* S. *from disposing of any of his movable property, and also interdicted the inheritance from being paid to him.*

On appeal, *the interdict was discharged.*

This was an appeal from a decision of the Acting Resident Magistrate of Kokstad on the 3rd May last. The respondent Kyd had instituted proceedings against several persons, amongst whom was the appellant, for the recovery of £1,000 damages for assault and attempt to kill. While this action was pending an application was made by the respondent to the Acting Resident Magistrate alleging that the appellant with others of the defendants was interested in and expected to receive certain moneys from the estate of the late Johannes and Annie Bezuidenhout when the same should be liquidated, and that the assets of that estate were to be sold on the 4th May: and further, that it was feared in the event of judgment being obtained against the defendants that it would not be satisfied, and that without the protection of the Court no goods or chattels would be found belonging to any of them. Two of the defendants, Lepula and Blayi, were also said to be possessed of twenty head of cattle. The prayer was for an interdict restraining the defendant or any other person from disposing of any movable property belonging to them or its proceeds, an order attaching the said property, and an order restraining the executors of Johannes and Annie Bezuidenhout from paying any moneys out of the estate to the defendants first mentioned pending the action.

The orders prayed for were granted, and put in execution. The defendant Steenkamp then applied to the A.R.M. to discharge the interdict on the ground that it was not granted on any legal grounds, and that he had no intention of disposing of or removing his stock, or of leaving the jurisdiction at any time. The A.R.M. refused to discharge it, and the defendant appealed to this Court.

The Assistant Magistrate gave the following reasons for his judgment. The temporary interdict was originally granted at the instance of Kyd, a well-grounded apprehension existing that before the civil suit against Le Fleur and others could be heard and terminated the stock of Steenkamp and others would be removed, resulting in injury to Kyd.

When the application for the discharge of the interdict came before the Court I considered and was satisfied that irreparable injury was likely to be caused to Kyd by its removal, while no injury was caused to the applicants (Steenkamp and others), they being simply restrained from removing or parting with any of their stock then running on the farm Driekop. The stock actually remained in their possession and they were allowed the free use of it in every way.

Mr. Schreiner, Q.C., for the appellant: There is no law which justifies the granting of this interdict, and it should be set aside. This Court has jurisdiction under Act 26 of 1894.

Mr. Innes, Q.C., for the respondent: I admit the Court's jurisdiction. No material injury can be shown by the interdict having been granted. The action has now been heard, and judgment has been given: the stock must by this time have been seized in execution or held as security for execution pending appeal. The question is only one of costs, and the Court will be in a better position to deal with the matter when the case comes before the Court on appeal.

The Chief Justice said: In my opinion the order of the Magistrate must be discharged. A summons had been issued against Steenkamp and others on a charge of attempting to commit murder, and upon the strength of the said summons, the plaintiff hied to the Magistrate for an order restraining the appellant from parting with certain property. The Court granted the order, and its terms clearly show that it was granted upon the ground that there existed a well-grounded apprehension that before the civil suit came to be decided, the property belonging to Steenkamp would be removed, and injury would thus be done to the plaintiff in case he won his suit. Now the Magistrate might have got this information from elsewhere, but the information is not to be found in the records now before this Court. The only thing which in the remotest manner indicates what might be such an apprehension is the sixth clause of the petition praying for the interdict, which stated that a summons had been issued by that Court against the said Bezuidenhout and others, and it was feared that in the event of a judgment being obtained against them that the same would not be satisfied, and that without the assistance of the Court no goods or chattels would be found belonging to any of them. But although it is clear that the plaintiff had some fear, before judgment was issued, that the defendant might do away with this property, that fear was not sufficient grounds for an interdict. Some facts should be stated upon which the Court might rely for its judgment. I am not prepared to say that even in the event of such being given that would be sufficient, as this Court would probably require some proof of the defendant's intention to go out of the country, or some proof of his intention to deprive the plaintiff of his rights. For these reasons I think the judgment entirely wrong, and the order must be discharged so far as it affects the appellant Steenkamp.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Fairbridge, Arderne, & Lawton.]

LOUW v. FRYER.

1898.
Aug. 2nd.

Medical and Pharmacy Act, 1891—Remitting case for evidence to Magistrate's Court—Appeal—Condition precedent.

Where a statute requires proof of a particular fact as a condition precedent to a plaintiff's right to recover a charge in a Court of law and such proof is not given in a Magistrate's Court, the Supreme Court will not, on appeal, exercise its power of remitting the record to the Court below for the purpose of taking such evidence.

The plaintiff brought an action in a Magistrate's Court to recover his charges for medical attendance and for medicines supplied, but produced no proof of his being licensed to practise or to supply medicines. Absolution was asked for by the defendant, but the Magistrate gave judgment for the plaintiff.

Held on appeal *that the production of such proof at the trial was a condition precedent, under the* 60*th section of Act* 34 *of* 1891, *to plaintiff's right to recover his charges, and the judgment was accordingly altered into one of absolution from the instance.*

This was an appeal from a decision of the Resident Magistrate of Calvinia. The respondent, Richard Charles Fryer, of Clanwilliam, sued the appellant, Abraham Johannes Louw, in the Magistrate's Court for the sum of £15 12s., for medicines prescribed and given and medical services rendered. Appellant's agent in the Court below when the case came on excepted in the first instance that a sufficiently specified account had not been served on the appellant. This exception was overruled by the Magistrate. Thereupon appellant's agent put in a counter-claim for £9, and when the plaintiff had closed his case asked for absolution on the ground that there was no proof that the plaintiff was licensed as a chemist and druggist to sell medicines. This was refused, and after evidence had been given for the defendant the Magistrate gave judgment in favour of the plaintiff for the amount claimed, and gave absolution from the instance in respect of the counter-claim.

Mr. McGregor for the appellant: There is no proof of the respondent's authority to practise as required by Act 34 of 1891. A licence as a practitioner does not entitle the practitioner to sell medicines. *Conroy* v. *Bezuidenhout* (6 Sheil, p. 326).

[Maasdorp, J.: Does the plea of the general issue raise the question of the plaintiff's qualification and title to recover?]

That was decided in *Wagstaffe* v. *Sharp* (3 M. and W., p. 521); *Taylor on Evidence* (section 308); *Shearwood* v. *Hay* (5 A. and E., p. 383).

[De Villiers, C. J.: Act 34 of 1891, section 60, seems to make the proof a condition precedent to recovery.]

Cunningham and Mattinson's Precedents of Pleading (p. 434) refers to section 32 of 21 and 22 Vict., cap. 90, which is almost identical with that section, and says that proof of registration is required even if admitted. The plaintiff is in the same position as a person who comes into court without a power to sue.

Mr. Benjamin for the respondent. It is stated in the interrogatories taken that the plaintiff is a medical practitioner: that means that he is a person licensed under Act 34 of 1891. The Act itself defines the meaning of medical practitioners. If section 60 is strict we cannot succeed as to the charge for supply of medicines, but it would work great hardship if the matter could not be remitted to the Magistrate for evidence.

De Villiers, C.J.: The action was brought in the Magistrate's Court of Calvinia to recover the plaintiff's charges for medical attendance on and for medicines supplied to the defendant. No proof was given that the plaintiff was licensed either to practise as a physician or to supply medicines, and after the plaintiff's evidence had been given absolution was applied for on that ground by the defendant. The Magistrate, however, went into the merits of the case and gave judgment for the plaintiff. Under the 33rd section of the Magistrate's Court Act, 1856, this Court has large powers of remitting a case to a Magistrate's Court for further evidence or information, and this is the course which might have been taken to supply the defect in the present case if the 60th section of the Medical and Pharmacy Act, 1890, had not stood in the way. That section enacts that "no person shall be entitled to recover any charge in any Court of law for any medical advice, or for any medicine supplied, unless he shall prove upon the trial that he is licensed under this Act." Such proof then is a condition precedent to the plaintiff's right to recover, and as the proof was not given, absolution from the instance ought to have been granted. The appeal must therefore be allowed and judgment of absolution entered with costs, but not including the expenses of the defendant's witnesses.

Buchanan and Maasdorp, J.J., concurred.

[Appellant's Attorneys, Messrs Walker & Jacobsohn; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

NIEMAND V. NIEMAND. } 1898. Aug. 3rd.

Husband and wife — Adultery — Divorce—Condonation—Reconciliation.

A decree of divorce will not be granted at the suit of a husband who, knowing of his wife's adultery, continues to live under the same roof with her although not cohabiting with her, under circumstances which would justify the belief that a reconciliation has taken place.

The same rule applies to a wife who continues to live in the same house with an adulterous husband, but the circumstances which would justify the inference of a reconciliation would not necessarily be the same in both cases.

The plaintiff having married her husband against the wishes of her relatives, discovered after some time that he was living in adultery with another woman in the same house in which they were living. She remonstrated with him once, but he answered her with violent language and continued his adulterous intercourse for twelve years. During that time she never had sexual intercourse with her husband, and at the end of that time she left him and sought refuge with her brother, who assisted her in instituting an action for divorce. The parties were poor and there were children of the marriage.

Held, *that the plaintiff was entitled, under the circumstances, to a decree of divorce.*

This was an action for divorce instituted by Mrs. Niemand against her husband on the ground of his adultery with one Maria Niemand. She claimed, in addition to a decree of divorce, a division of the joint estate, the custody of the minor children of the marriage and £5 a month maintenance.

The defendant denied the adultery, and in reconvention prayed for an order for restitution of conjugal rights, and failing compliance with such order a decree of divorce and the custody of the minor children.

Mr. McGregor appeared for the plaintiff.

Mr. Buchanan for the defendant.

Martha Maria Johanna Niemand, the plaintiff, said she was married to the defendant in 1875. Maria Niemand was her niece. The defendant released her from gaol and brought her to their house twelve years ago, and she had remained there ever since; she had slept with the defendant ever since. Plaintiff herself slept in a separate room but did not consent. She had five children, and Maria had six children while in the house. At first there was only one room in the house: plaintiff and her children slept on one bed, while defendant and Maria slept on the other. A partition was afterwards put up and Maria occupied one side while plaintiff occupied the other. Defendant treated her badly. Finally, in consequence of his beating one of her children badly with a bridle, she left the house and went to her brother.

Cross-examined, witness admitted that her family was against her marriage. She denied that it was with her consent that Maria came to the house. She complained to the defendant of his conduct twelve years ago, but he only swore at her. On April 11 last she went to her brother. She had been afraid to go to him before because her husband would swear at her.

She had not had intercourse with her husband for twelve years. She had never during the twelve years seen her brother.

Jasper Johannes Ratz corroborated the plaintiff as to the mode of life of the parties.

G. G. Swanepoel, brother of the plaintiff, said she was in a terrible condition and ill in bed for some time after she left defendant and came to him. He had not seen her for twenty years in consequence of her marriage. Her whole family were against her marriage.

Two sons of the plaintiff corroborated her evidence.

Godlieb Casparus Niemand, the defendant, denied the cruelty and also the adultery.

Maria Niemand denied adultery with the defendant. She admitted that she had had six illegitimate children and gave the names of their fathers; the father of the last two was Hendrik Niemand, the son of the plaintiff.

After argument,

De Villiers, C.J.: The Court is satisfied that the defendant has committed adultery with Maria Niemand, and that his conjugal misconduct has extended over a period of about twelve years. During this period the plaintiff lived under the same roof with him, but the Court is satisfied that after discovery of his adultery she never had sexual intercourse with him. In April last she left him, the immediate cause of her leaving being that he beat one of their children too severely. There is no plea on the record of anything in the nature of connivance, collusion, or condonation, but the defendant's counsel has contended that the plaintiff's delay in instituting proceedings for divorce and her residence for several years under the same roof with her husband and his paramour disentitle her to relief.

By the law of this country the adultery of one of two married persons entitles the innocent spouse to a decree of divorce. The right, however, to obtain a divorce may be waived by word or deed. It is obvious that connivance at the offence or collusion between the parties would be a complete waiver of the right to take advantage of it. It is well established also that sexual intercourse after the innocent party has become aware of the adultery amounts to a condonation of the offence and disentitles him or her to relief. Such was the decision of the Supreme Court of Vriesland in the very ancient case of *Van Horien* v. *Van der Lyt* (Sande 2, 6, 2), the ground of the decision being that a reconciliation is presumed to have taken place between the parties if they cohabit with knowledge of the past adultery. This is really the test whether the right to a divorce is taken away by conduct subsequent to the adultery. It is the test which is recognised by *Voet* (24, 2, 5), who adds that such reconciliation may be evidenced by the manifest consent of the innocent spouse or by sexual intercourse after knowledge of the offence. The English cases which have been quoted do not render much assistance in the decision of the question raised, but in a case which was not quoted, namely that of *Keats* v. *Keats* (1 Sev. and Tr., 334), an observation fell from Lord Chancellor Chelmsford which bears a close resemblance to the observations of some of the Dutch text writers. "I think," he said, "that the forgiveness which is to take away the husband's right of divorce must not fall short of reconciliation." It is somewhat difficult to understand *Voet's* remark that such reconciliation may be evidenced by the "manifest consent" (*consensu aperto*) of the innocent spouse. "Consent," in the proper sense of the term, can only be given before the act, whereas "reconciliation" can only take place after the offence has been committed. Possibly *Voet* may have meant by the expression *consensus apertus* such a course of conduct after the commission of the offence as would justify the inference that the innocent spouse was a consenting party. But whatever his meaning might be, I quite hold the view that a decree of divorce should not be granted at the suit of a husband who, knowing of his wife's adultery, continues to live under the same roof with her, although not cohabiting with her, under circumstances which, would justify the belief that a reconciliation has taken place. The same rule would apply to the wife who continues to live in the same house with an adulterous husband but the circumstances which would justify the inference of a reconciliation would not necessarily be the same in both cases. A wife, more often than a husband, has no choice in the matter. In the present case we have to deal with a wife who had married her husband against the wishes of her relatives. She was poor, and had no place to seek refuge in. When she remonstrated with the defendant about his conduct he answered her with violent language. At length, after bearing with her husband's conduct for twelve years, during which time she never cohabited with him, she sought refuge with her brother, who has assisted her in instituting this action. Her conduct in my opinion was not such as to justify the inference of connivance, collusion, acquiescence or reconciliation. The delay in seeking redress was very long, but under the peculiar circumstances of the case it is impossible to hold that the delay precludes her from obtaining relief. The Court will grant a decree of divorce and give the custody of the children to the plaintiff, with costs.

[Plaintiff's Attorneys, Messrs. Dempers & Van Ryneveld; Defendant's Attorney, H. P. du Preez.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice, the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

LONGWORTH AND CO. V. LOUIS MOSS. { 1898. Aug. 4th.

Mr. De Waal applied for a writ of civil imprisonment on an unsatisfied judgment for £120, with £6 10s. 8d. taxed costs, and £2 4s. 8d. execution costs. Execution was issued on July 16, which defendant failed to satisfy, and a return of *nulla bona* was made.

Granted.

Postea (August 12th).

Mr. Buchanan applied on behalf of the defendant for leave to re-open the case and have the writ set aside.

Mr. De Waal, for the plaintiff, opposed.

The Court allowed the matter to be re-opened and the affidavits were read.

The affidavit of the applicant set forth that he was a licensed auctioneer in Cape Town, and his earnings averaged £8 per month, beyond which he had no means of support. The respondents had obtained judgment against him for £120, a writ of execution was issued, and a return of *nulla bona* made. After that a writ of personal attachment was made against him. He was in court on the day the writ of personal attachment was granted, and while waiting for the case to come on he was called out of court by one Lynch, a private detective in the employ of respondents. He had intended to offer £1 per month, but when he got back to court he found that judgment had been given against him, and he had been in gaol since August 4 last. Lynch, in an affidavit, denied that he ever went into court when the decree of civil imprisonment was granted. Other affidavits were put in to show that defendant had received £400 recently for a business in Johannesburg, and that he intended leaving the country when arrested.

The applicant, being sworn said, that he left Johannesburg on July 7 last, and the £221 he had received for his property there had mostly to be paid to his creditors. He denied that he intended going to England. He had a wife and four children, and his wife had a café in Cape Town, but that was her own business, her money being put into it.

The Court refused to grant the application for the applicant's release, and he was removed in custody.

ILLIQUID ROLL.

ABRAHAMS V. FRIEBUS.

Mr. Close applied, under Rule 319, for the costs in this case. The summons was for the transfer of certain land, but as the defendant had now signed a power to pass transfer, only the costs were asked for.

Granted.

VAN DER BYL AND CO. V. WILLIAM MCKENDRICK.

Mr. Ashburnham applied, under Rule 329, for judgment for the sum of £28 5s., goods sold and delivered, with interest *a tempore moræ*, and costs of suit.

Granted.

MCGREGOR V. GRAHAM.

Mr. Close applied for judgment under Rule 329 for £5,000, the purchase price of certain landed property in Long-street, with interest and costs of suit, the plaintiff tendering transfer of the property.

Granted.

IN THE MATTER OF THE PETITION OF GUSTAVUS TROLLIP.

This was an application for an order authorising the Registrar of Deeds to cancel certain two bonds without the production of the original bonds and the consents to cancellation. It appeared that two bonds, one of which was passed in 1892 and the other in 1897, had disappeared, along with the consents to cancellation, from the office of the petitioner, an attorney. Inquiries had been made, but the manner in which the documents had gone astray could not be ascertained. It was presumed that they had fallen into the hands of some person, who had removed the stamps and destroyed the papers.

The Court granted a rule, returnable on August 11, calling upon all concerned to show cause why the cancellation should not be effected, the rule to be published in a Cape Town newspaper.

De Villiers, C.J., said that on the return day the written consent of the mortgagees to the cancellation must be produced, and there must also be satisfactory proof as to the manner in which the deeds were lost. He wished it to be understood that if such proof was not of a satisfactory nature the rule would not be made absolute. If a crime had been committed there must be an inquiry, and it should be easy to trace it.

Postea (August 11th.)

Mr. Close moved that the rule *nisi* be made absolute. The consent of the two mortgagees had been ordered by the Court to be produced. Up to the present only the consent of one mortgagee had been obtained, but a telegram had been received stating that the consent of the other mortgagee had been forwarded through the post, and it was expected that it would be received the following day. With regard to the remarks of the Court when the rule *nisi* was granted, that on the return day some particulars should be given as to the manner in which the documents went astray, affidavits had been made by Mr. Trollip, also by the clerk who was entrusted with the conveyance of the deeds to the Deeds Office, and the clerk in the Deeds Office. Mr. Trollip had absolutely no knowledge as to the manner in which the documents were lost, beyond the fact that it might have been due to gross carelessness on the part of the clerk entrusted with the charge of them, who must have left them at some place outside Mr. Trollip's office, where they had probably been found by some person, and taken for the sake of the uncancelled stamps on them. The affidavit of the clerk entrusted with the documents was to the effect that he believed the documents had been mislaid by him, and accidentally destroyed; otherwise he was unable to account for the loss of the documents. The affidavit of the clerk in the Deeds Office showed that the documents had never been lodged there for cancellation.

De Villiers, C.J., said the danger was that if the order was made there would no longer be any attempt to bring the offender to justice.

Mr. Close said that Mr. Trollip was anxious for the sake of his office that the matter should be cleared up if possible.

In reply to the Chief Justice, Mr. Close said that the value of the uncancelled stamps was £24 9s. 10d.

De Villiers, C.J., said: The Court will make the rule absolute, subject to the production of the consent of the other mortgagee, but I hope there will be no relaxation of Mr. Trollip's efforts to discover who the real culprit is.

VASS V. SOMERSET.

Mr. Benjamin applied for leave to sue *in forma pauperis* in an action for damages. The defendant resided at Hanover.

An order was granted, the rule to be returnable on August 11.

VICTOR WOLFF AND CO. V. SOLOMON.

This was an application for an order setting aside the plaintiffs' notice of bar, and allowing the defendant Solomon time to plead. On May 26 last Solomon applied to the Court to set aside a writ of arrest which had been taken out against him for an amount of £3,968. The writ was set aside, and Wolff & Co. ordered to proceed with their case this term. It was now contended that as Wolff & Co. had not filed their declaration with the Registrar of the Court until July 8, the defendant had not been able to file his pleas. Defendant said that as there were a large number of accounts to be gone into, the ordinary time allowed for pleading was not sufficient, and he asked for a further period of fourteen days.

Mr. McGregor for the applicant (defendant in the action).

Mr. Innes, Q.C., for the respondents (plaintiffs in the action).

After argument,

The Court set aside the order of bar, and gave defendant ten days in which to plead; costs to abide by the result of the action.

IMPEY V. FALCONER.

This was an application that a rule *nisi* interdicting respondent from trespassing on applicant's property, be made absolute. Applicant (Dr. Impey) bought certain property at Zonnebloem from respondent and entered into an agreement with him whereby respondent was to do certain work on the property, which work was to be completed by July 7. For doing that work £175 was deposited. The work not being done at the agreed date, applicant, on July 26, gave respondent notice that he would call in another contractor to complete the work. Another contractor was got, but on his going to the property he found respondent's workmen there.

The applicant in his original affidavit stated that he had purchased certain ten houses in Zonnebloem from the respondent in terms of an agreement in writing dated 11th June, 1898, the fifth clause of which was in the following terms: "The said Mary Falconer hereby agrees to allow the said Samuel Patton Impey to deduct from the purchase price the sum of £175 in respect of the estimated cost in completing the said houses on condition that should the said Mary Falconer properly complete the same according to the specifications and to the satisfaction of Samuel Patton Impey, on or before the 7th day of July, 1898, this sum shall be refunded to her by the said Samuel Patton Impey." That as the respondent had taken no steps to complete the buildings by the said date he had employed a contractor to complete them. That the respondent had now entered and trespassed upon the premises with her workmen and broken up the floors, &c., in laying down pipes, and doing other work not in accordance with the specifications, and to the detriment of the building. That the respondent had had notice to vacate the premises, but up to the present had refused to do so.

A rule *nisi*, operating as an interdict, was granted by Mr. Justice Buchanan upon this affidavit. The rule called upon the respondent to show cause why an interdict should not be granted, preventing her or her workmen from trespassing on applicant's property, or continuing certain work thereon.

The respondent's husband and general agent had now filed an affidavit stating that he had always been anxious and willing to complete the building of the houses, and immediately after the signing of the agreement had put a number of men on to the work in order to get it completed within the specified time, but the heavy rains falling prevented him from doing so before the 7th July. On the 26th July, and while the work was still being proceeded with, he had first received notice from applicant's attorneys that he had engaged another builder. He was anxious to complete the work in order to obtain the £175 retained by the applicant, and it would take about three days to complete.

The applicant in an answering affidavit said that he had been called upon by the Town Council in June to complete the water supply, drainage, and other necessary works to finish the houses, and that on the 8th July, as respondent had done nothing, he told the City Engineer he would do what was required. Nothing was done by his contractor before the 20th July owing to the delay of the Town Council. On the 24th he told the respondent's husband that an agreement had been made with another contractor, and that the former was not to enter the premises for the purpose of doing any work.

Mr. McGregor for the applicant.

Mr. Benjamin for the respondent: Time is not of the essence of the contract here. *Pollock on Contracts* (p. 486): *Embden on Building Contracts* (p. 164). The mere fixing of a date does not make time of the essence: the intention to do so should be clearly shown.

De Villiers, C.J., said: The respondent claims the right to finish this work, but the applicant says, "I am the owner of the property, which has been duly transferred to me, and I insist upon this property being left in my hands, and left to me to complete." I think that as the registered owner he was entitled to take up that position, but that does not affect the other question as to whether the respondent is not entitled to the full sum of £175. That question is not settled by this decision. Probably it may be found that the respondent is entitled to a *quantum meruit*, and that any expenditure she may have made not exceeding £175 may be deducted by her. Probably that may be found to be the solution, and I would suggest that the parties come to some terms as to what has actually been expended and proper compensation given for the work done. The rule must be made absolute, with costs.

[Applicant's Attorneys, Messrs. Sauer & Standen: Respondent's Attorney, Mr. A. Steer.]

SUPREME COURT

[Before the Right Hon. SIR J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

POGGENPOEL V. POGGENPOEL AND JACOBUS. } 1898. Aug. 10th.

This was an action for divorce instituted by Philip Adrian Poggenpoel against his wife, Wilhelmina Magdalena Poggenpoel, on the ground of her adultery with one Pieter Jacobus. Plaintiff prayed for a decree of divorce, forfeiture by defendant of the benefits of the marriage in community of property, and against the defendant Jacobus £100 damages and costs of suit. Both the defendants resided at Maitland.

Mr. Upington appeared for the plaintiff.

There was no appearance for the defendant.

Philip Adrian Poggenpoel, the plaintiff, said he was married to Wilhelmina Magdalena Poggenpoel on June 16, 1884. They were married in community of property. There was only one child of the marriage, and it was now dead. Their married life was not a happy one, and on February 15 of this year he obtained a decree of judicial separation against his wife. About May last he heard certain reports about her in consequence of which he brought the present action.

Rosina Kietjes said that she was the aunt of Mrs. Poggenpoel, and the latter came to live with her before the judicial separation. She left witness on May 7 of this year, returning a little later to take away her goods, because she said she was going to take Pieter Jacobus as her husband. She then left. Pieter Jacobus was a gatekeeper, and Mrs. Poggnpoel during the time she was residing with witness used to go in the evening to Jacobus' box and stay there with him for several hours.

Maria Wentzel, a niece of the last witness, gave corroborative evidence, and also gave evidence as to Mrs. Poggenpoel's misconduct with Pieter Jacobus.

The Court granted a decree of divorce as prayed, and ordered the defendant Jacobus to pay the costs of the action.

[Plaintiff's Attorney, G. J. O'Reilly.]

JOHNS V. COLONIAL GOVERNMENT.

Mr. Sheil, Q.C., on behalf of the Government, applied for a postponement of the hearing of this action until a later day, and further for cause to be shown why the plaintiff should not be called upon to pay the costs of the application, as notice had been given to plaintiff's attorneys on August 2 that it would be necessary to have a postponement, as several material witnesses for the Government being scattered over Namaqualand could not be got here in time for the trial. A postponement until August 24 had been asked for.

Mr. Innes, Q.C. (with whom was Mr. Currey), for the respondent (plaintiff in the suit), said they consented to a postponement until August 17, but they did not wish for too long a postponement.

The Court granted the postponement until August 24, costs of the application to be costs in the cause.

STEENKAMP V. KYD. { 1898. Aug. 10th.

Agency—Conspiracy to wage war.

A person who conspires with others to wage war against the Queen and joins them in appointing a leader to conduct the war, is responsible for damage done to individuals by the orders of such leader if such orders might reasonably have been anticipated as a consequence of the conspiracy.

This was an appeal from the decision of the Resident Magistrate of Kokstad. The appeal was instituted by Piet Steenkamp and Willem and Adrian Bezuidenhout, three out of thirty-seven defendants in an action which was brought before the Resident Magistrate of Kokstad by Kyd for the sum of £1,000 damages, for damages alleged to have been sustained by him at the hands of the defendants, by their having committed an assault upon him, or aided or abetted each other in committing that assault. The evidence showed that on December 8, 1897, at the farm Willows, near Kokstad, the appellants assaulted Kyd with assegais, sticks, and other instruments with intent to murder him. The point raised by the appellants was that there was not sufficient evidence to convict Steenkamp and the other appellants of the alleged assault, that there was nothing to show there was either such actual assault on their part, or such instigation or assistance by them as would render them according to the Colonial law liable in a civil action for the damages which were undoubtedly sustained by Kyd. There was a great deal of evidence to show that these men with others were conspirators against the Government of the country, and were going to carry on war against the country under the leadership of one Le Fleur, who was also one of the original defendants. It appeared that on December 8 Steenkamp had been away at a place known as Dold's store, and on his return he told something to Le Fleur, who was at the farm Driekop, which adjoined the Willows, where Kyd was the same day assaulted. The message was to the effect that one Jacobs had told Steenkamp that Kyd had called for the Cape Mounted Rifles, or had made a complaint to Government. Le Fleur had then ordered two parties to proceed to Kyd's farm and arrest him, and take away his guns, but had warned them not to hurt or kill him. Steenkamp and the two other appellants alleged that they did not go with either of these two parties, but remained behind with a third party composed of sixteen men, who were a reserve, but had nothing to do with the assault. They had, however, joined the former parties after the assault and had with them taken flight. The Magistrate gave judgment against all the defendants, jointly and severally, for £350 5s. 6d., with costs.

The Magistrate in his reasons referred to sections 77, 78 and 81 of Act 24 of 1886, as laying down who were the parties to an offence both before and after the fact. He said that the action of the party which remained behind, showed that it was aware of the attack on Kyd and was considerably interested in the result, and afterwards identified itself with the attacking party. He quoted *Addison on Torts* (pp. 3, 93) and *Van der Linden* (pp. 183, 184) and held that it was clear that all the defendants who actually went to Kyd's and those who remained behind were party to and guilty of the assault on Kyd.

Mr. Schreiner, Q.C., for the appellants: The appellants may be criminally liable but not civilly. The *Lex Aquilia* would make them liable civilly only where the damage is occasioned by their instigation, exhortaation, assistance or advice (*impulsu, auxilio, hortatu, consiliove*).

[De Villiers, C.J., referred to Act 24 of 1886, sections 77, 78 and 81.]

The statutory rule there laid down will not be extended beyond the four corners of the Act.

[De Villiers, C.J.: Ought not the appellants to have known that the whites would be attacked, and Kyd amongst them?]

The evidence shows that they had no idea that Kyd would be attacked.

[De Villiers, C.J.: Do they not accept Le Fleur as their leader? If then Le Fleur gives orders to assault Kyd are they not liable for his acts as their agent?]

No, because Le Fleur had no authority to assault Kyd; when they delegated authority they knew nothing about Kyd. The liability for the assault is either under *Lex Aquilia* or it does not exist at all. *Voet* (9. 2. 25).

Mr. Innes, Q.C., for the respondent, was not called upon.

De Villiers, C.J.: It is unnecessary to hear counsel for the respondent, the plaintiff in the Court below. It is quite true, as urged by Mr. Schreiner, that the law-books provide no definite rule to meet the particular case with which the Court has now to deal. If our law had been a codified system the absence of such a rule might have been a serious difficulty, but under our system of law, the principles underlying the decision of previous cases may be made use of for the purpose of discovering the rule which should be applied to the combination of facts which has now arisen. It is nowhere laid down in express terms that a person who conspires with others to wage war against the Queen and joins them in appointing a leader to conduct the war is responsible for damage done to individuals by the orders of such leader if such orders might reasonably have been contemplated as a consequence of the conspiracy. But such a rule may be fairly deduced from the cases relating to the law of agency, and if, in future cases, the rule is construed by the light of the facts of the particular case in which it is judicially laid down no danger can arise from its being somewhat too broadly or too narrowly stated. What, then, are the facts of the present case? A number of natives, including the defendants, conspired to make war, as they expressed it, against the Government. For the purpose of carrying out their illegal purpose they selected one Le Fleur as their leader and therefore, as their agent. He divided the insurgents into parties and sent one of these parties to arrest the plaintiff, a white farmer living in the neighbourhood, who was known to have guns in his possession and to have sent to the Cape Mounted Rifles for assistance. The plaintiff, in attempting to resist the arrest, was severely wounded and received injuries of a permanent nature. He brought an action in the Court below to recover damages for these injuries from the defendants. Their defence was that as they took no part in the illegal arrest and did not authorise it, they could not be held responsible. But they took part in selecting and appointing Le Fleur as the leader of the insurgents, and it is admitted that the illegal arrest was made by his orders. If an attack on the plaintiff might reasonably have been anticipated as a consequence of the rebellion, the defendants must be held liable in damages for the injury inflicted upon him. The evidence satisfies me, and must have satisfied the Court below that such a consequence might reasonably have been anticipated. Apart from that evidence it is a historical fact that in all our native wars the Europeans living in the neighbourhood of the rebels have been the first object of attack. Even, therefore, if the defendants were not directly concerned in the attack on the plaintiffs they might reasonably have expected that such an attack would be made, and they did nothing to prevent it. I am of opinion therefore that the Magistrate was right in awarding damages to the plaintiff, and that the appeal must be dismissed with costs.

Buchanan, J., said: I wholly concur in the judgment of the Chief Justice. If it had been necessary I would even have been prepared to dismiss the appeal on further grounds, for it has been shown by the evidence that there was a common purpose among all the parties present to attack Kyd. The party was formed into three troops, one troop, presumably composed of the boldest of the lot, to do the active work the second party to support the first, while the third party was to be a reserve. There was thus a common purpose to attack Kyd which should render them all, severally and individually, liable for the consequences.

Maasdorp, J., also concurred.

[Appellants' Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice) the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

Ex parte CROTS. { 1898. Aug. 11th

Mr. Schreiner, Q.C., applied for the admission of Frederick Petrus Crots as an advocate of the Court.

The order was granted and the oath administered.

BROWN LAWRENCE AND CO. V. H. GOLDBERG.

Mr. Upington applied for the final sequestration of the defendant's estate. The provisional order was granted on August 6 last.

Order granted.

ROUX V. J. E. DUGGAN.

Mr. Maskew applied for provisional sentence on a promissory note for £1,832 9s., with interest thereon at the rate of 6 per cent. from August 7, 1897.

Granted.

DU PLESSIS V. J. GROENEWALD.

Mr. Benjamin applied for a decree of civil imprisonment against the defendant on an unsatisfied judgment for £80, with £9 19s. 10d. taxed costs and £2 18s. 6d. costs of suit.

Granted.

ILLIQUID ROLL.

BELL AND MORE V. J. GROENEWALD.

Mr. Close applied for judgment, under Rule 329, for the sum of £15 1s. 5d., goods sold and delivered, with costs of suit.

Granted.

AFRICAN BANKING CORPORATION V. THE STANDARD DIAMOND-MINING COMPANY, LIMITED—BULTFONTEIN MINE.

Mr. Maskew applied, under Rule 329, for judgment for the sum of £7,014 15s. 6d., balance due by the defendant company to the corporation by virtue of an overdrawn account, with interest at the rate of 7 per cent. from June 11, 1898, on the above amount.

Order granted.

BEHR V. HENDRICKS.

This was an application for judgment under Rule 329 on a summons claiming transfer to the plaintiff of certain pieces of land situated near Salt River Railway-station.

Mr. Maskew appeared for the plaintiff, and said that the costs of the suit only were now asked for, transfer having been passed since summons.

Judgment granted.

GENERAL MOTIONS.

IN THE MATTER OF THE PETITION OF JOHANNA PORCH.

Mr. Close moved for an order authorising the issue of a certified copy of a mortgage bond, the original of which had been lost. The original bond had, in the course of certain business transactions, got into the hands of a person who had since gone to America, leaving no address or place where he could be found.

The Court granted a rule *nisi*, calling upon all persons concerned to show cause, by August 25, why the application should not be granted. One publication of the rule to be made in a Port Elizabeth newspaper.

Postea (August 30th).

The rule was made absolute.

MCGREGOR V. GRAHAM.

This was an application for an order to re-open proceedings, and to allow defendant to enter appearance and defend the action.

Mr. Innes, Q.C., for the applicant (the defendant in the action).

Mr. Close, for the respondent, asked for a postponement.

Mr. Innes consented.

The Court granted a postponement until August 18, execution to be stayed meanwhile.

Postea (August 18th).

The application was heard.

Mr. Benjamin for the applicant.

Mr. Close for the respondent.

The application was granted.

IN THE INSOLVENT ESTATE OF HAROLD GOLDBERG.

Mr. Upington moved for the appointment of Mr. E. R. Syfret as provisional trustee in the above estate, there being a number of articles of a perishable nature in the estate which would have to be disposed of at once.

Granted.

DE VILLIERS V. DE VILLIERS. { 1898. Aug. 11th.

This was an action for restitution of conjugal rights, failing which for decree of divorce, brought by the plaintiff against her husband on the ground of malicious desertion.

Mr. Buchanan for the plaintiff; defendant did not enter appearance.

Francis le Sueur, clerk in charge of the marriage registers in the Colonial Office, produced the certificate of marriage between the parties.

Susannah de Villiers (born Holm), the plaintiff, stated that she was married to defendant at Ceres on August 19, 1896. They were married in community of property. Her husband had no property, but she had about £100. After their marriage they lived happily at Ceres with her people for five months. Plaintiff and her husband then went to Johannesburg, where they resided for two months in an hotel. During that time her husband did not treat her very well, on one occasion holding a razor at her throat. Afterwards they went to Germiston, where her husband had secured work. They had frequent quarrels there, and on March 29, 1897, her husband deserted her, leaving her without a penny. She went to some relations in Johannesburg, and afterwards to the Paarl, where she heard her husband had gone to reside with his parents. She stayed in his parents' house for some time, but defendant would not take her back as his wife. He told her to go to her people, and he and his father would come and see about getting a divorce. That was in May, 1897, and she had never seen defendant since, nor had he supported her since then. There was no issue of the marriage. She had written asking him to take her back, and had received one reply from him.

Counsel read the letter, which referred to proceedings for a divorce, and expressed regret at the serious step he had taken (referring to his marriage).

In answer to the Chief Justice, plaintiff said that defendant was only twenty years of age when he married.

The Court granted the order, calling upon defendant to return to, or receive, the plaintiff on or before August 31, failing which to show cause on September 5 why a decree of divorce should not be granted with costs.

[Plaintiff's Attorney, C. C. Silberbauer.]

STAPLES v. JACKSON.

1898.
Aug. 11th.

Seizure of liquor without warrant—Restoration — Act 28 of 1883, Section 87.

J., *a constable, having received information that* S. *was carrying on an illicit trade in liquor, seized certain liquor belonging to the latter and instituted criminal proceedings against him for contravention of* Act 28 *of* 1883. S. *was acquitted. Immediately after the criminal proceedings the Magistrate heard an action instituted by* S. *against* J. *for the restoration of the liquor and damages, and gave judgment for the defendant on the ground that the liquor seized was no longer in the possession of* J. *and that he had therefore nothing to restore.* On appeal, *the Magistrate's decision was reversed.*

This was an appeal from a decision of the Assistant Resident Magistrate at Robertson in an action tried on the 9th June last, and in which the present appellant, plaintiff in the Court below, sued the respondent, the Chief Constable of Richmond, to recover possession of certain property, and for damages.

The summons alleged that on or about the 1st June, 1898 and at Four Mile Camp the defendant wrongfully and unlawfully seized and removed, or caused to be seized and removed, and did possess himself of out of a truck belonging to the plaintiff, certain two casks containing brandy and two bottles of whisky of the value of £5 sterling or thereabouts, the property of the plaintiff, or in his lawful possession, which he unjustly detains from the plaintiff, and refuses to restore to him.

That by reason of the said unlawful action of the defendant the plaintiff suffered further damage in the sum of £5. The plaintiff prayed that the defendant might be adjudged to restore to him the said goods forthwith or pay the value thereof as aforesaid, and that he further be adjudged to pay to him the damages as aforesaid with costs of suit. The defendant admitted having seized the brandy and whisky in question, but said that he did so in the execution of his duty with proper cause and without malice. He further denied that the plaintiff had suffered any damage on account of the aforesaid seizure.

Plaintiff's attorney excepted to the plea as being vague and embarrassing. The Court overruled the exception.

The defendant's attorney admitted that the liquor was seized without the Chief Constable being in possession of a warrant.

The plaintiff in his evidence gave particulars as to the seizure of his liquor, and as to the damage which he had sustained by being obliged to come to Robertson to consult a lawyer.

The defendant, in his evidence, justified his seizure of the liquor on the grounds that he had received information that the plaintiff was carrying on an illicit trade in liquor at the Four Mile Camp on the extension of the Ashton Railway.

He justified his detention of the liquor on the grounds that he had instituted a criminal action against the plaintiff for contravention of the Act 28 of 1883, and he considered that the liquor should be in court and retained until the case had been disposed of. [The criminal charge against the plaintiff was heard on the same day and immediately before the present action, and resulted in the plaintiff's acquittal.]

The defendant further stated in his evidence that he had no objection to the plaintiff now having his liquor, and that he would return the same to such place as the Court decided.

The Assistant Resident Magistrate gave judgment for the defendant with costs.

The following: were his reasons: In this case the defendant, Henry Jackson, Chief Constable, was summoned to restore to the plaintiff two casks of brandy and two bottles of whisky seized by him, the defendant, in the execution of his duty, or to pay the value thereof, and secondly, to pay to the plaintiff £5, as and for damages sustained.

The plaintiff was proceeded against in a criminal action for selling liquor to certain coloured people without having taken out the necessary licence as required by law.

The liquor seized by the Chief Constable was the *corpus delicti*, which had to be produced in the criminal action. That action having been dismissed by the Resident Magistrate who tried the case, I hold that the liquor seized was no longer in the possession of the Chief Constable, and he had therefore nothing to restore to the plaintiff, and as plaintiff failed to prove any substantial damages I gave judgment for the defendant with costs.

From this judgment the plaintiff now appealed.

Mr. Schreiner, Q.C., was heard in support of the appeal.

Mr. Sheil, Q.C., for the respondent.

Mr. Schreiner: The Chief Constable's action can only be justified by statutory authority. Act 28 of 1883, section 87, gives authority to a justice of the peace if he is satisfied, by information on oath, that there is reasonable ground to believe that liquor has been, or is being sold or kept for sale at any place, to issue a warrant for the search of such place and seizure of liquor; this section was discussed in *Van Wyk* v. *Viljoen* (4 Juta, p. 76). The powers granted by it were not exercised in the present case. Act 27 of 1882, section 14, does not apply: section 15 gives no power of seizure There is some evidence of damage inasmuch as it cost ten shillings to get the liquor back to the camp.

Mr. Sheil: The reason for the Chief Constable's action was that he thought the liquor was an exhibit in the case and in the custody of the Court. It was unnecessary to make any order for restoration. As to the seizure, it is very seldom that a policeman has a warrant when he seizes liquor under such circumstances.

De Villiers, C.J.: It appears that the Magistrate has tried to do substantial justice, but in his attempt he has overlooked the formalities and requirements of the law. The plaintiff was undoubtedly entitled to the restoration of the liquor. The Magistrate, however, considered that as the liquor was there ready to take away it was not necessary to give that judgment, and say that the plaintiff could take it away. But the plaintiff having claimed restoration of the liquor it was the duty of the Court to have given judgment for the plaintiff, and such a judgment ought to have carried costs. Since the plaintiff has had to come to this Court he must have costs in this Court also. The order of this Court will be that the defendant restore the liquor to the plaintiff, or in default of delivery pay him the sum of £5 as damages; defendant to pay the costs in the Court below and in this Court.

[Appellant's Attorneys, Messrs. Findlay & Tait; Respondent's Attorneys, Messrs. J. & H. Reid & Nephew.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

LEVIN V. MAHOMET.

1898.
Aug. 12th.

Mr. Jones applied for provisional sentence on a promissory note for £17.

Granted.

LEVIN V. HALKETT.

Mr. Jones applied for provisional sentence on a promissory note for £67.

Granted.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

MAGISTRATE'S COURT CASE REVIEWED.

1898.
Aug. 18th.

De Villiers, C.J., said: A case has come before me from the Assistant Resident Magistrate at the Paarl, in which two boys were charged with stealing two geese and some eggs. They pleaded not guilty, but were found guilty, and were sentenced to three months' imprisonment, with hard labour. The only two witnesses against the prisoners were a boy named Krawtz, twelve years of age, who spoke about the prisoners bringing to their house two geese and some eggs, and another boy, aged eight years, who spoke of the prisoners bringing to the house two turkeys and some eggs. If the case had rested there, probably the proceedings might have been confirmed, because the second witness might have made a mistake about the things stolen, but subsequently to the case having been sent up to the judge for review, two convicts who had broken out of the Convict-station, were charged with stealing sheep from Mr. Le Roux, the man whose geese had been stolen, and in the course of the inquiry it transpired that the convicts had stolen the geese. Then the question arises, whether the Governor should be recommended to grant a pardon or the Supreme Court should quash the conviction, and it is considered to be more satisfactory that the Court should quash the first conviction on the ground of the unsatisfactory evidence in the first case. At all events after the discovery of this fresh evidence it would be impossible for me to certify to the proceedings being in accordance with substantial justice. The Court has therefore decided that the proceedings in the case against the two boys should be quashed.

MAGISTRATE'S COURT CASE REVIEWED.

Maasdorp, J., said: A case has come before me from the Paarl, in which two men were charged with escaping from gaol. Both pleaded guilty, and were sentenced to receive thirty lashes. After giving this sentence the Magistrate discovered his error, and brought it to the notice of the Court, the error having been that he had exceeded his jurisdiction by giving thirty lashes, as the maximum punishment allowed under section 28 of Act 23 of 1888, on which the proceedings were based, was twenty-five. The sentence must therefore be altered, and the lashes reduced to twenty-five.

Ex parte JONES.

Mr. Close applied for the admission of Mr. Percy Sydney Twentyman Jones as an advocate.—Granted.

Ex parte MCILWAINE.

1898.
Aug. 18th.
„ 25th.
„ 30th.

Advocate—Admission of—Bachelor of Laws—Honorary degree—*Honoris causa* degree—University Incorporation Amendment Act, 1896.

The degree of Bachelor of Laws conferred by the Cape University, without examination on a person who has obtained an equivalent degree from another University, does not, since the passing of Act 6 of 1896, entitle the holder to be enrolled as an advocate of the Supreme Court.

This was a motion for the admission of the applicant as an advocate of the Supreme Court.

The petition was in the following terms:

1. That your petitioner is of the full age of twenty-one years and upwards.

2. That your petitioner has passed the examination for, and has duly obtained the degrees of Master of Arts and Bachelor of Laws in the Royal University of Ireland, and has been duly admitted to the *ad eundem* degrees of Master of Arts and Bachelor of Laws in the University of the Cape of Good Hope, as appears from the certificates of the Registrar of the University hereunto annexed.

3. That your petitioner is desirous of being admitted and enrolled as a barrister or advocate of the Supreme Court of this colony.

Wherefore he prays that your lordships may be pleased to admit and enrol him as such.

The following certificates were attached to the petition:

The University of the Cape of Good Hope.
University Chambers, Cape Town,
15th August, 1898.

I certify that Robert McIlwaine has been admitted to the *ad eundem* degree of Master of Arts in the University of the Cape of Good Hope.

W. THOMPSON,
Registrar.

I certify that Robert McIlwaine has been admitted to the *ad eundem* degree of Bachelor of Laws in the University of the Cape of Good Hope. I further certify that the same is not an honorary degree.

W. THOMPSON,
Registrar.

Mr. Sheil, Q.C., for the applicant: Act No. 6 of 1896 repeals section 8 of Act No. 16 of 1873, and by section 5 empowers the University Council to frame bye-laws and regulations for the admission without examination of persons who have obtained the degree of Bachelor of Laws in other Universities to the said degree in the Cape University, provided that such persons have obtained or been admitted to the degree of Bachelor or Master of Arts in the latter University.

Section 20, Act 16 of 1873, enacts that persons who shall have obtained or been admitted to the degree of Bachelor of Laws in the Cape University are eligible to be enrolled as barristers or advocates of the Supreme Court.

The University by virtue of the above Acts framed certain regulations for the admission of Bachelors of Laws of other Universities: those prior to 1897-98 stipulated that such *ad eundem* admission should not include Bachelors of Laws of other Universities, unless they had obtained the degree of Bachelor or Master of Arts in the Cape University *by examination*. *Vide Ex parte Krause*, (5 Sheil, 148).

The present University Regulations do not require the degree in arts to be obtained by examination, it may be *ad eundem*.

The certificates of the Registrar of the Cape University attached to the applicant's petition, show that he is legally qualified under section 20, Act 16 of 1873, for admission as a barrister or advocate.

It cannot be contended under section 5, Act 6 of 1896, that the degree of Bachelor of Laws conferred on the applicant is an honorary degree; the section limits honorary degrees to those of Master or Doctor, and the University Registrar certifies that the degree is not an honorary one.

All the leading Universities treat honorary and *honoris causa* degrees as synonymous. The University of Cambridge uses the words honorary and *honoris causa* as synonymous terms (*Vide* Calendar).

The Statutes of the University of Oxford, which are written in Latin, prescribe regulations for the admission to degrees *honoris causa*, yet the Calendar of the University refers to the same degrees as *honorary*.

The Universities of Edinburgh, Glasgow, Aberdeen, and St. Andrews regard the terms *honoris causa* and *honorary* as equivalent, as also the Irish Universities.

Why therefore, should the above terms occurring in an Act dealing with the Cape University receive a construction at variance with the language of the leading English, Scotch, and Irish Universities.

Section 5, Act 6 of 1896, has been regarded by the Council of the Cape University, as exemplified by their practice, as giving them power to frame regulations for the conferring or admitting to degrees of the following three classes:

1. Degrees after passing certain examinations in the Cape of Good Hope University.

2. Degrees without examination in the Cape University, conferred on persons who have obtained higher, like or equivalent degrees in other Universities recognised by the Cape University, such degrees generally known as *ad eundem* degrees.

3. Honorary degrees of Master and Doctor, conferred *honoris causa* on persons deemed worthy of the distinction, and without

reference to the passing of examinations in the Cape of Good Hope University or elsewhere.

The University in pursuance of the above interpretation has framed regulations for each of the above three classes of degrees; the same have been duly approved and published in the "Government Gazette."

No person has so far complied with the requirements of the regulations for admission to honorary degrees, hence no one has been admitted to an honorary degree.

A considerable number of graduates of other Universities have been admitted to *ad eundem* degrees, amongst others the applicant, Robert McIlwaine: therefore if the Court holds that his is an honorary degree, the University Council will be confronted with having entirely misconstrued section 5, Act 6 of 1896, and having admitted a number of graduates of other Universities to honorary degrees, when it was intended to admit them to *ad eundem* degrees, and notwithstanding the fact that no person has so far complied with the requirements of the regulations for admission to honorary degrees.

It will further follow that the Court has admitted the following holders of honorary degrees in law as advocates of the Supreme Court, although not otherwise qualified to practise, as required by the Act, viz.:

Daniel de Waal, admitted on the 12th January, 1897.

Frederick Petrus Crotts, admitted on the 11th instant.

Further, as will be seen from the Calendars of he above-mentioned Universities, it is not the custom to confer honorary degrees of Bachelor.

The petitioner paid a fee for admission to the degree in question, whereas no fee is required for admission to an honorary degree.

The petitioner possesses every qualification and has observed every formality necessary to receive an *ad eundem* degree: he possesses none of the qualifications and has complied with none of the formalities for admission to an honorary degree, why therefore should he be regarded as holding an honorary degree?

[De Villiers, C.J.: *Johnson's Dictionary* has the following "an honorary degree is a degree conferred in a privileged manner on the strength of royal or noble birth."]

In the Oxford Calendar, p. 376, the list of degrees *honoris causa* have the heading "Honorary Degree." See also the Cambridge Calendar, p. 150.

[Buchanan, J.: There is nothing to compel the University to admit any person to an *ad eundem* degree. If the applicant's contention is correct, the University would have the power of drawing distinctions as to what persons are to be entitled to practise as barristers.]

Crotts was admitted after Act 6 of 1896 had been passed.

[De Villiers, C.J.: Crotts' certificate did not state that he had been admitted to the LL.B. degree *ad eundem*.]

Mr. Innes: The position of the Cape University is, that it does not consider an *ad eundem* degree to be an honorary degree but considers "honorary" and "*honoris causa*" to be synonymous. Section 5 is clumsily drawn, but it does not give the word "honorary" a meaning which it does not bear in a University sense.

Mr. Schreiner: The admission of practitioners is a question for this Court, and therefore the legal construction must be placed upon the word "honorary." The qualification for admission are contained in the Charter of Justice, section 17, and Act 12 of 1858, section 2. Act 16 of 1873, section 20, further entitled persons who had obtained or been admitted to the degree of LL.B. in the Cape University. That was the law existing when Krause was admitted: *Ex parte Krause* (Sheil 5, p. 148). If Crotts was wrongly admitted it was done *per incuriam*. The object of section 5 was to limit the admission to practise which has been widened by Act 16 of 1873. "Honorary" in the section has a distinct meaning from "*honoris causa*," the latter refers to Master's and Doctor's degrees only. The words "*ad eundem*" are not used in the Act; admission to *ad eundem* degrees are made under section 5. Under Act 30 of 1892, section 4, the Governor may notify by proclamation "that any examination in law, specified in such proclamation, is to be deemed, for the purposes of this Act, equivalent to the examination for the degree of Bachelor of Laws in the University of the Cape of Good Hope," but that can only be done after consultation with and obtaining the unanimous approval of the judges of the Supreme Court in Cape Town. The University admits *ad eundem* without reference to the details of the examination passed. The definition of honorary given in Webster's

Dictionary is "conferring honour or intended merely to confer honour." An *ad eundem* degree is a mark of distinction obtained elsewhere.

Mr. Sheil: Act 30 of 1892 has no application.

Mr. Innes: Section 20 of Act 16 of 1873 still stands and is not repealed by Act 6 of 1896, except by inference.

De Villiers, C.J.: It may be safely affirmed that there is no British colony which is more liberal in the admission of advocates to practise than the Cape Colony. Persons admitted as barristers in England or Ireland, or admitted as advocates in the Court of Session of Scotland, and even persons admitted to the degree of Doctor of Laws at the Universities of Oxford, Cambridge, or Dublin may be admitted to practise here. The petitioner now applies to be admitted to practise here. The petitioner now applies to be admitted by virtue of his degree of Bachelor of Laws which was conferred on him without examination by the Cape University under the 5th section of Act No. 6 of 1896. He holds the degree not of doctor, but of Bachelor of Laws in the Royal University of Ireland. He has no right to practise as a barrister in the Irish Courts but he claims the right, by virtue of his *ad eundem* degree conferred by the Cape University, to be admitted as an advocate of this Court, although he has never passed any examination of the Cape University. The admissions authorised before the passing of the Act just mentioned can form no precedent in the present case, because its decision must depend upon the true construction of the concluding proviso of the 5th section of the Act. The proviso is "That no holder of an honorary degree in law shall, unless otherwise qualified, be eligible to be enrolled as a barrister or advocate of the Supreme Court, and that admission to a degree, *honoris causa*, shall not entitle the holder of such degree to the practice of any profession by virtue of such degree." In support of the petition it is maintained that an "honorary degree" signifies the same thing as a degree "*honoris causa*," whilst on the other side it is contended that by "honorary degree" is meant a degree conferred by the Cape University without examination on a person who had obtained an equivalent degree from another University, There is evidence to show that, in an academical sense, degrees conferred *honoris causa* are included among honorary degrees, but it is not quite clear that honorary degrees may not also include degrees which are not conferred *honoris causa*. But the real question is what the Legislature meant by the terms "honorary degree." Throughout the section these terms seem to be used in a sense different from that of a degree *honoris causa*. It is difficult to account for the tautology of the proviso which I have read unless a difference was intended to be made between the two degrees. Reading the section as a whole I can come to no other conclusion than that an honorary degree was intended to mean a degree conferred without examination on persons who have obtained an equivalent degree from another University, and that a degree *honoris causa* was intended to mean a degree conferred without examination on persons who are deemed worthy of such distinction, although they may not have obtained an equivalent degree from any other University. If this view be correct the application must fail. The petitioner is the holder of the honorary degree of Bachelor of Laws, and as he is not "otherwise qualified" he cannot be enrolled as an advocate of this Court. It is to be hoped that he will qualify himself by passing the examinations of the Cape University, and thus remove the objection which the Court regretfully feels bound to maintain. I may add, that if, since the passing of the Act, any holders of the honorary degree have been admitted as advocates, it was because the fact that the degree had been conferred without examination was not brought to the notice of the Court.

Buchanan, J., and Maasdorp, J., concurred.

Ex parte PIENAAR.

Mr. Maskew applied for the admission of Mr. Hendrik Jacobus Pienaar as an attorney and notary.—Granted.

PROVISIONAL ROLL.

LIQUIDATORS OF OLIPHANTSVLEI GOLD-MINING COMPANY V. VICTOR WOOLF.

Mr. Schreiner, Q.C., on behalf of the plaintiffs, moved for provisional sentence upon an unsatisfied judgment of the High Court of Pretoria for £550, with costs, dated the 22nd November, 1895.

The defendant was sued in his official capacity as liquidator of the firm of Victor Woolff & Co. and also individually.

Mr. Close appeared for defendant.

The application was granted, with costs against the defendant in his official capacity only.

SEDGWICK AND CO. V. ROOF.

Mr Benjamin applied for judgment under Rule 329 for the sum of £28 10s. 9d., goods sold and delivered, less £20 paid since issue of summons.

CARDINAL V. CARDINAL.

This was an action for judicial separation.

Mr. Schreiner, Q.C., appeared for the plaintiff, and moved for judgment in terms of a consent paper.

Mr. Upington consented on behalf of the defendant.

After amendment of the consent paper, judgment was granted.

COLONIAL GOVERNMENT V. THE KAFFRARIAN STEAM MILL COMPANY.

Mr. Schreiner, Q.C. (with him Mr. Sheil, Q.C.), applied for judgment under Rule 319 for £2,050 10s. 11d., together with costs, on the ground of fraudulent misrepresentation in relation to goods sent over the Government Railways as Colonial produce when they were imported goods.

Mr. Close appeared for the defendant company.

The application was granted, and the plaintiffs allowed their costs of appearance in a motion set down by the defendants to have the bar removed, but now withdrawn.

REHABILITATIONS.

Mr. De Waal applied for the rehabilitation of Joseph Johannes de Beer.

Granted.

Mr. Close, on behalf of the surviving spouse, applied for the discharge from sequestration of Jan Adrian Stephanus Venter, deceased.

Granted.

GENERAL MOTIONS.

SPRECKLEY V. SPRECKLEY.

Mr. Benjamin applied for an extension of the return day of the rule for leave to sue *in forma pauperis*.

Granted. The return day extended to the last day of term.

In re GIDEON FRANCOIS BENADE.

Lunatic—Act 1 of 1897—Curator Bonis.

Mr. Sheil, Q.C., applied for the appointment of a *curator bonis* to G. F. Benade, a lunatic at present in confinement under a detention order granted by a judge in chambers. At the time the order was granted, no application for the appointment of a curator had been made as might have been done under section 15 of Act 1 of 1897. Provision was made by section 34 of the same Act, for the appointment of a curator by a judge at any time on the application of the official *curator ad litem* if the lunatic's property does not exceed £500, or his income £50 per annum. Application could not be made under section 34 in this instance, inasmuch as the lunatic's property exceeded £500. The Court was therefore asked to make an order as if the application had been originally made under section 15.

No order was made, the Court intimating that the application should be made to a judge in chambers.

IN THE ESTATE OF THE LATE HENDRIK ADRIAN VAN ZYL.

Mr. Upington applied for an order confirming the sale of certain property.

Granted.

STANSFIELD AND ANOTHER V. JORDAN AND ANOTHER.

Mr. Close, on behalf of the defendants, Jordan and another, applied for the postponement of a trial, set down for Monday next, until next term.

Mr. Benjamin appeared for the respondents, the plaintiffs.

The allegation of the plaintiffs was that they were engaged by the defendants, the Flying Jordans Company, whilst they were in Australia for a six months' tour, but they were dismissed in Cape Town after being with them for four months only. The Flying Jordans were now in Mauritius, and could not be communicated with, as their address was not known.

The application was refused, and the Chief Justice strongly recommended that the parties should come to a mutual settlement.

STEPHEN V. POOLE.

Mr. Ashburnham applied for the award of an arbitrator to be made a rule of Court,—Granted.

THE MILNERTON ESTATE, LIMITED V. COLONIAL GOVERNMENT.

Mr. Schreiner, Q.C., applied for an order striking out as irrelevant a certain portion of defendants' plea.

Mr. Sheil, Q.C., appeared for the defendants.

De Villiers, C.J., said he could not see how the case of the plaintiff was prejudiced by the plea.

Mr. Sheil agreed to an amendment of the plea by adding certain words.

The Court made no order but gave leave to defendant to amend his plea, the question of costs being reserved.

BROWN V. BROWN.

Mr. Schreiner, Q.C., applied, on behalf of Mrs. Brown, for leave to sue for restitution of conjugal rights by edictal citation.—The application was granted, personal service to be effected.

BAM V. ROBBERTSE.

Mr. Maskew applied for an order attaching certain property to found jurisdiction, and for leave to sue by edictal citation.—Granted, the order being returnable for September 12.

IN THE MATTER OF THE PETITION OF ANNIE BEZUIDENHOUT.

Mr. Upington applied for leave to petitioner to transfer certain property without the assistance of her husband, whose whereabouts are unknown.—Granted.

IN THE MATTER OF THE PETITION OF EDWARD PETRUS JOHANNES MOSTERT.

Mr. Buchanan applied for the cancellation of a certain bond paid off in 1864.—Granted.

QUEEN V. STOLTSZ.

Mr. Sheil, Q.C., applied for the removal of this case to the Uitenhage Circuit Court.—Granted.

CARNE V. KERR'S AGENCY.

1898.
Aug. 18th.
„ 19th.

Malicious arrest.

This was an action for malicious arrest and prosecution.

The plaintiff was a bookkeeper by profession and in his declaration alleged that up to April 1898, he had been employed as manager of the business carried on by the defendant Howe as a carrier at Wynberg under the name of Kerr's Agency. On or about that date he was dismissed and on April 6, the defendant made a charge of embezzlement against him; he was arrested and kept in custody and brought before the Magistrate of Wynberg. The defendant gave evidence in support of the charge but it was dismissed. Plaintiff alleged that the charge was false and malicious, and claimed £500 damages.

The defendant in his plea justified his dismissal of the plaintiff on the ground that the latter was intoxicated during hours of business and justified his action in making the affidavit upon which the warrant for arrest was issued on the ground that plaintiff had at the date of his dismissal retained certain moneys belonging to him and though requested to deliver up such moneys had failed to do so.

Mr. Buchanan appeared for the plaintiff.

Mr. Schreiner, Q.C. (with him Mr. Close), appeared for the defendant.

William Walter Carne, the plaintiff, said he had no cash-box or safe, and he had to keep certain moneys of the firm in his pocket until the Mondays, when he paid them over to the firm's accounts. On the 1st of April Mr. Howe came to him and complained that the horses were so tired that the goods could not be sent out to Sea Point. A dispute arose, and Mr. Howe told him to clear out and go to h——. Mr. Howe was a man of violent temper and intemperate habits. On the 1st of April Mr. Howe was in liquor, but he (witness) was not. When he was told to clear out he did so. He had no opportunity of making up the books, and he had then some money in his pocket belonging to the firm, and he took it with him. On the following day he called at the office and saw the man who had been appointed manager in his place: nothing was said about the money which belonged to the firm, but he received £2 10s. for his week's wages. On that day he went to a cricket match, and on returning he counted the money belonging to the firm in the presence of two gentlemen. There was a little over £13. On the following afternoon Mr. Howe sent a messenger down to ask him to go and see him, and he did so that evening. When he went to see Mr. Howe, he (Mr. Howe) said he regretted what had happened, but he did not say anything about any money. That evening Mr. Howe and two or three other men spent the evening at his (witness's) house, but nothing was said about the money, or about making up the books. On Monday he went to the office and saw the manager, who refused to let him have the books to make up. That same evening he again saw Mr. Howe, but nothing was said about the books. On the following day, the 5th April, he called at the office and received the books, and made them up and returned them. He brought up a balance of £13 8s. 4d., and returned the books to Mr. Norman, the manager, but he did not pay over the money to him, as he wanted to pay it to Mr. Howe. Soon after midnight, after going to bed, a constable visited his house and arrested him on a charge of embezzlement. He then handed over to the constable £13 9s. He was taken to the Mowbray Police-office and locked in a cell, where he had to sleep on boards. On the following morning he was taken to the Wynberg Police Court, where he was placed amongst a lot of off-coloured people and niggers. He was remanded on bail, but as his securities were not forthcoming just then he had to spend another night in the cells at Wynberg. A week later he was again brought up and discharged, no evidence being called for the defence. His defence at the trial cost him £3 3s., and since the trial he had not had constant employment, although he had done some canvassing. A report of the case had appeared in the newspapers, and subsequently an advertisement appeared in the press, stating that Kerr's Agency had cleared off the old and untrusted servants, and that he and others were not connected with the firm.

By Mr. Schreiner: His agreement with the firm was for £2 10s. a week, but nothing had been said about notice on dismissal. Mr. Howe never told him to bank all sums of £1 and upwards. A month after he went to the firm he was not intoxicated, but Mr. Howe charged him with it. He had never been intoxicated in business hours. He was not drunk on April 1. Until he was arrested he never heard anything about the money which he owed to the firm. He did not borrow the £13 9s. to balance account against him. He had the money in his possession when he was dismissed, and he kept it on one side until the time he was arrested. If Mr. Howe had asked for the money when he left the office he could have had it. Although he had not received instructions to bank the money, he frequently did so, but he did not make any deposit for a week before he left. He would have booked it on the following Monday. Under the circumstances it was not an unusual thing for him to walk out of the office with his employer's money in his possession. Even after the dismissal he was on good terms with Mr. Howe, who told him to try to buy a business, and he would put him (witness) into it to manage it.

Corroborative evidence was given by James Keerby and Stephen Edward Samuel.

Frederick Procter, sub-manager of Messrs. Jagger & Co., said he had always found plaintiff steady and attentive to business. He had never seen him the worse for liquor. Messrs. Jagger & Co. did not now do business with Kerr's Agency. On the 1st April, about three o'clock, he saw plaintiff, who was perfectly sober. He also saw defendant at the same time, and he was the worse for liquor.

Jack H. Morkel, of Messrs. Walter Searle & Son, said that on a certain day he met the plaintiff in the street, and he told him that he had just been turned out from the agency, and sent to a hot place. At that time plaintiff was perfectly sober.

Postea (August 19th).

Arthur Egbert Woods Howe, the defendant, said he employed plaintiff as manager in January this year. He (witness) was in bad health at the time and left Carne in charge of everything. He gave plaintiff full instructions to bank all moneys over £2. Before the 1st of April he had to complain of plaintiff's intemperate habits. On one occasion he smacked him across the cheek, and on another he dismissed him, but as plaintiff apologised he took him back again. He admitted that he (witness) was a man of rather quick temper. When he went down to the office about twelve o'clock on April 1 plaintiff was tumbling over the cases. He was drunk. There was no doubt about that, and he ordered him to clear out. He saw plaintiff on the following evening in a public-house at Mowbray, and plaintiff promised to square up the books and pay the money which was due. On the Sunday he sent two messages to plaintiff, and when he saw him in the evening plaintiff again promised to square up the books. Before he dismissed plaintiff he told him that he was going either to Klondyke or Hope Town.

The Chief Justice said he could not understand why the plaintiff was arrested in the middle of the night.

Mr. Schreiner said that was a point which he could not understand also.

Defendant stated that he got the warrant about midday, and immediately took it to the Police-station. After that he knew nothing about the manner in which he was arrested. He had no malice against the plaintiff at the time he dismissed him.

In cross-examination: He had dismissed other servants for getting drunk and stealing money from him. It was certainly not a fact that he was almost always drunk. Sometimes he posed as a bit of a fighter, but he could not fight now as he could not see. He could not say that this was due to drink. The reason he arrested Carne was because he would not deliver up the money according to the promises which he had made.

By the Chief Justice: When he made out the affidavit he was perfectly sober.

In re-examination: When he made the affidavit he did not know that the plaintiff had had the books to make up.

Mr. Buchanan and Mr. Schreiner, Q.C., addressed their lordships, the latter stating that in August the defendant made the plaintiff an offer to pay him £12 10s. and costs, not as an admission of liability, but simply for the purpose of saving all the costs and inconvenience of a trial. He submitted that this offer should have been accepted.

De Villiers, C.J.: In order to succeed in this action the plaintiff must prove that there has been a prosecution and an acquittal, and also that the prosecution was without reasonable and probable cause and was undertaken maliciously. Before going into the facts of the case, I may state generally that where the evidence of the plaintiff and the defendant is in conflict, the Court believes the evidence given on behalf of the plaintiff. It has been said by Mr. Schreiner—and this was the main point of his contention—that the plaintiff had certain money belonging to the defendant in his possession, and that, *primâ facie*, he must be held to have embezzled the money because he did not hand it over when he was dismissed. In regard to that it is important to consider what the practice of the parties was. The plaintiff said he had to receive and pay out money for the business. He had no arrangements with the defendant about banking the money. His practice was to pay it into the bank when he had a good amount. He had power to endorse cheques. He used to keep the money until he had about £8 or £10. He had no cash-box, but kept the cash in his pocket, and the defendant knew that the plaintiff was in the habit of carrying sums up to £8 or £10 in his pocket. It is not denied that there has been a prosecution and an acquittal, and the question is whether it was a reasonable one, and whether there was malice on the part of the defendant. I am of opinion that there was an utter absence of a reasonable and probable cause under the circumstances. The defendant knew that the plaintiff was anxious to have the books for the purpose of making them up, and I can quite understand that the plaintiff, who had been in the habit of keeping sums of money in his possession, would not hand over the sums of money which he had in his possession at the time of his dismissal without first checking that amount by the books. He was summarily dismissed and without access to the books he could not compare the amount in his possession with that in the books. The plaintiff went to the office to secure possession of the books, and the defendant's manager refused him access. Not only that, but the defendant was aware, from his manager, that the plaintiff had sought access to the books, and had been refused. Before the dismissal the defendant said he had received information to the effect that the plaintiff wished to leave the country, and to carry money away with him, and yet, after that time, he was on the best of terms with the plaintiff, and said he spent a jolly time with him one night. On Sunday night they were playing whist together, and on the Monday night they were drinking together, and the Court is asked to believe that all this took place when the defendant believed that the plaintiff was trying to rob him of his money. Defendant now stated that he played whist with the plaintiff in the hope of being able to get his money out of the plaintiff. Then suddenly, on the Tuesday, though nothing had happened in the meanwhile, in mere wantonness, the defendant went and made an affidavit, and had him arrested. But what took place in the interval does not appear to be clear. The defendant thought that by this indirect means, by taking out a criminal warrant, he would hurry him up. A civil summons would not have the same effect, and he would make use of a criminal arrest to hurry him up. Then it is said that this does not prove malice. In my opinion any wantonness or indirect motive goes far to prove malice. There was an utter absence of reasonable cause. The mere detaining of that money under the particular circumstances was not sufficient to justify anyone in believing there was any criminal intent on the part of the plaintiff. As to the evidence about plaintiff's drunkenness, I think the evidence goes to show that he was not the one who was intoxicated. Mr. Morkel, an independent witness, saw him immediately afterwards, and says he was perfectly sober, and yet the defendant wishes us to believe that at the time of his dismissal he was tumbling over the boxes in a state of utter intoxication. I believe that if there was any intoxication, there was more on the part of the defendant on that occasion than on the part of the plaintiff. It is said that the plaintiff has not sued for wrongful dismissal, and consequently he must have felt that he was properly dismissed. The plaintiff says he thought it would be a County Court case; probably he means a Magistrate's Court case. But that does not affect the question of whether he is entitled to damages for malicious prosecution. There is another circumstance which tends to show malice, and that is the advertisement, in which the defendant said he had made a clean sweep of the old and non-trustworthy servants, and that Carne and others were no longer in his employ. Under these circumstances the plaintiff is entitled to some damages. I dare say there has been some aggravation given by the plaintiff. Probably he has not the sweetest temper, and probably there was something on his part to aggravate the case. For these reasons I am not inclined to give very heavy damages, but I think that the amount of £12 10s. is not quite sufficient. The Court think that £25 damages and costs will satisfy the justice of the case.

Buchanan, J., concurred.

[Plaintiff's Attorney, Mr. D. Tennant: Defendant's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., (Chief Justice the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

VAN DER WESTHUIZEN v. VELENSKI. } 1898. Aug. 22nd.

Sale—Written contract—Evidence—Specific performance.

V. and W. agreed to the sale of certain land by V. to W. upon certain conditions. The agreement was written in pencil and signed by both parties, and contained the following clause; "A contract to be properly drawn up and shall be signed by the parties to-morrow." The following day W. tendered for V's. signature another document to the same effect as the first, but framed in more formal language and written in ink. In an action for specific performance of the contract,

Held, *that V. could not adduce evidence of any conditions inconsistent with the written agreement.*

Held, further, *that the first document was binding and V. be ordered to duly execute the formal contract or pay damages.*

This was an action brought by Johannes van der Westhuizen against Abraham Velenski, both of Oudtshoorn, for a declaration that a certain memorandum of agreement was binding on the defendant; secondly, for an order compelling the defendant to sign a formal contract embodying that agreement; and thirdly, in the alternative, in case the defendant should not sign the formal contract, then £10,000 damages were claimed for breach of contract.

The declaration was as follows:

1. The plaintiff is a farmer, residing at Zeekoegat, in the district of Oudtshoorn; the defendant resides at Oudtshoorn.

2. On the 15th March, 1898, a contract was entered into between the plaintiff and defendant in terms of which the defendant

agreed to give and secure to the plaintiff the right of purchase of a portion of the said farm Zeekoegat, together with certain adjoining ground which then belonged to the defendant, and a similar right in respect of certain 1,500 ostriches, also the property of the defendant.

3. The purchase price at which it was agreed that the plaintiff should have the right of purchasing the said property was the sum of £40,000, being £35,000 for the said land and £5,000 for the ostriches, payable in certain instalments then and there agreed upon, but not necessary to be herein set forth.

4. It was agreed between the parties that the right of purchase given to the plaintiff should last for six months from the 15th March, 1898; within which period the plaintiff was to have the option of confirming or cancelling the said right. But it was specially contracted and agreed that should he fail to exercise the said right and confirm the said purchase within the said period then he should forfeit to the defendant the sum of £100, for which he was to sign a provisional promissory note in favour of the defendant, dependent upon the said contingency.

5. A pencil memorandum of agreement embodying all the terms of the said contract was then and there drawn up, and signed by the plaintiff and defendant. But it was specially agreed, and a clause to that effect was inserted in the memorandum, that a formal contract, embodying all the provisions of the said memorandum, should be duly prepared, and should be signed by both parties on the following day, the 16th March, 1898. A copy of the said memorandum is hereunto annexed and marked A.

6. The plaintiff duly caused a formal document to be prepared by the attorney, Christian Michael Lind, who had been present on the 15th March, and who had written out the said pencil memorandum, which document embodied all the terms of the contract as agreed to and recorded in manner aforesaid, and which document was duly tendered for signature to the defendant on the 16th March, 1898.

7. The defendant wrongfully and unlawfully refused to sign the said document, though the plaintiff was then, and still is, ready to sign it and to abide by its terms. A copy of the said document is hereunto annexed and marked B.

8. The defendant wrongfully and unlawfully claims that the contract embodied in the memorandum, of which annexure A is a copy, is not binding upon him, but that he is entitled to repudiate it, and refuses to execute the more formal contract heretofore referred to.

The plaintiff claims:

(*a*) An order declaring that the contract embodied in the memorandum, of which annexure A is a copy, is valid and binding upon the defendant.

(*b*) An order compelling the defendant to duly sign and execute the formal written contract of which annexure B is a copy; the plaintiff on his part offering to sign the same, and to sign the conditional promissory note therein referred to.

(*c*) In the alternative, should the defendant refuse to sign the said contract, and should he repudiate his obligations thereunder, payment of the sum of £10,000 as damages.

(*d*) Alternative relief.

(*e*) Costs of suit.

A.

Memorandum of agreement entered into at Oudtshoorn on the 15th March, 1898, between A. P. Velenski, seller of, the one part, and J. D. van der Westhuyzen, purchaser, of the other part, witnesseth:

1 The said Velenski agrees to give and secure the pre-emptive right to the said Van der Westhuyzen of his share in the farm Zeekoegat and surrounding ground, including his stock of ostriches, viz., his 1,500, on the following conditions, viz.: The purchase price of the landed property £35,000, and the ostriches £5,000.

The said Van der Westhuyzen to have six months from this day's date to confirm or cancel the aforesaid right. Should he fail to confirm the sale within six months from this day's date, he shall forfeit the sum of £100 sterling, for which amount he shall pass a conditional promissory note to the said Velenski, depending upon the above contingency. Should the said Van der Westhuyzen decide to become the purchaser, the purchase money shall be paid in manner following: £4,500 on 1st May, 1900, when transfer of the property shall be passed in his favour, and he shall *simul et semel* pass a kusting brief for the balance of the purchase money, which shall be payable as follows: £4,500 on 1st May, 1902, £4,500 on 1st May, 1904, £4,500 on 1st May, 1906, and £4,500 on 1st May, 1908. The balance, viz., £17,500, to remain on first mortgage, to be repaid after twelve months' notice given or received.

The purchaser to have the right at any time after payment of the first instalment to pay the whole of the purchase amount or any portion thereof, provided such portion be not less than the instalments as above specified. Interest at the rate of 5 per cent. per annum to be paid on the unpaid portion of the purchase money half-yearly on the 1st May and 1st November in each and every year. All costs to be paid by the purchaser. A contract to be properly drawn up, and shall be signed by the parties to-morrow, the 16th instant. Possession to be given on the first day of May, 1900. Ground, &c., sold subject to lease existing between seller and M. S. Lipschitz and the purchaser.

Signed and executed by the parties this 15th March, 1898.

(Signed) A. P. VELENSKI.

(Signed) J. D. VAN DER WESTHUYZEN.

As witness : (Signed) C. M. LIND.

B.

Memorandum of an agreement made, entered into, and concluded at Oudtshoorn on this 16th day of March, 1898, between Abraham Phineas Velenski of the one part, and Johannes Dederick van der Westhuyzen of the other part, witnesseth :

1. That for the consideration hereinafter set forth the appearer of the first part declared to have given, granted, and secured as by these presents he does give, grant, and secure to the appearer of the second part the right of pre-emption in respect of or connection with his share of the farm Zeekoegat with surrounding grounds, including his stock of ostriches, namely, 1,500, and that upon the following terms and conditions :

2. That the purchase price shall be (*a*) £35,000 sterling for the landed property, and (*b*) £5,000 sterling for the ostriches.

3. It is further mutually agreed upon that the appearer, the said Johannes Dederick van der Westhuyzen, shall be allowed the period of six months from the 15th March instant within which to declare his determination to confirm or cancel the rights herein secured to him. Should he fail to confirm the sale and purchase within the period mentioned he shall forfeit the sum of one hundred pounds (£100) sterling, for which sum he shall pass his promissory note in favour of the said Velenski, with the condition depending on the above contingency.

4. Should the said Van der Westhuyzen decide to purchase the properties the purchase money shall be paid in manner following: (*a*) The sum of four thousand pounds sterling on the 1st day of May, 1900, when transfer and possession of the property shall be given to and passed in his favour, and he shall *simul et semel* pass a kusting brief in favour of the said Velenski for the balance of the purchase money which shall be payable : (*b*) Four thousand five hundred pounds sterling each on the 1st of May, 1902, 1st of May, 1904, 1st of May, 1906, and 1st of May, 1908 ; (*c*) the balance, namely, seventeen thousand five hundred pounds sterling, shall be payable twelve months subsequent to legal notice being given or received ; the right, however, is specially reserved to the said Johannes Dederick van der Westhuyzen, should he be so minded, at any time after payment of the first instalment to pay the whole or any portion of the balance of the purchase money, provided such portion shall not be less than any of the instalments as above specified.

5. The purchase money shall bear interest at the rate of 5 per cent. per annum, to be reckoned on the unpaid portions of the purchase money, calculated from the date of possession, and shall be payable every six months, that is to say, on the 1st of May and 1st of November in each and every year.

6. It is further agreed upon, that the purchaser shall pay all costs and charges in connection with this sale and purchase, including transfer duty, cost of bond, and transfer. It is lastly agreed upon that the properties are sold subject to the lease existing between the said Velenski and the said Van der Westhuyzen and M. Lipschitz. For the due and faithful performance of the foregoing the parties bind themselves the one to the other, their persons and properties of every description according to law.

Thus done and passed at Oudtshoorn on the day, month, and year aforesaid in the presence of the subscribing witnesses.

The defendant pleaded as follows :

1. As to paragraph 1 he admits that the plaintiff is a farmer residing at Zeekoegat in the district of Oudtshoorn, and that at the date of the transactions hereinafter referred to he the (defendant) was residing at Oudtshoorn, but save as is hereinafter set forth he denies the allegations in paragraphs 2, 3, 4, 5, 6, 7, and 8 of the declaration.

2. He admits that the memorandum A relative to the purchase by the plaintiff of the said farm Zeekoegat, his (defendant's) property, and of certain 1,500 ostriches

thereon, also defendant's property, was signed by him on March 15, 1898, but he says that the said memorandum does not contain the full and complete agreement between himself and the plaintiff.

3. He says that at the time of the signing of the said memorandum it was distinctly agreed and understood between the parties thereto that the said memorandum was only to state the principal terms and conditions of the agreement of purchase and sale of the property mentioned therein ; and that a fuller, proper, and complete contract would be drawn up on the following day, in which should be included certain details particularly providing conditions of reasonable security for the protection of the defendant, that the plaintiff would carry out the purchase and duly perform the obligations thereof ; it was also agreed that payment of the interest on the unpaid portion of the purchase money (that is to say upon the purchase price less the amount of the first instalment) should be made on May 1, 1900, and continue thereafter at intervals of six months, the said interest being thus payable in advance.

4. On March 16, the plaintiff tendered the defendant for signature the document, copy of which is annexed to the declaration marked B.

5. The defendant refused to sign the same unless the stipulation as to payment of interest in advance on May 1, 1900, and thereafter every six months, was clearly set forth therein, and unless the following stipulations were inserted in order to secure the defendant, and to ensure the due and faithful performance of the said agreement (B) by the plaintiff : (*a*) That the plaintiff should not be allowed to sell or dispose of any portion of the property purchased by him without the defendant's consent, until the second instalment of the purchase money had been paid, or in the alternative that the plaintiff should not obtain transfer of the property until payment of the said instalment. (*b*) That the plaintiff should assure the buildings upon the said property against loss by fire, until payment of the purchase price, and should cede the policy to the defendant. (*c*) That in the event of the plaintiff failing to pay any instalment of the purchase price or the interest on the due date, the whole of the purchase money become due and payable forthwith : the defendant offered forthwith to sign the said document if the stipulations referred to above were inserted,

6. The plaintiff refused to consent to the said stipulations (*a*), (*b*) and (*c*) being inserted in the said document, or any stipulations providing for the payment of interest on May 1, 1900, and thereafter in advance, and refused to consent to any alteration in the said document.

7. The defendant has always been ready and willing, and has tendered, and hereby again tenders to sign the said document B, provided that the stipulations above referred to set forth in paragraph 5 hereof are inserted.

8. The plaintiff has not signified to the defendant that he will exercise the option of the purchase of the said property claimed by him, and the defendant specially denies that the plaintiff has sustained any damages, or that any damage can be sustained in any event, until the plaintiff has notified his intention of purchasing the said property under the right of option claimed by him.

Wherefore, subject to the above tender, he prays that the plaintiff's claim may be dismissed with costs.

The replication was general.

Mr. Schreiner, Q.C. (with him Mr. Buchanan) for the plaintiff.

Mr. Close (with him Mr. Gardiner) for the defendant.

Mr. Schreiner objected to any evidence being led of any other agreement than that contained in the written document attached to the declaration.

[De Villiers, C.J. : In what respect was the original contract incomplete ?]

Only in that it was written on a very flimsy piece of paper and signed in pencil.

[De Villiers, C.J. : Does not a "proper contract" mean "a contract with all the necessary conditions which it is not possible to place in this contract" ?]

All the necessary conditions are here. Nothing inconsistent with the agreement can be proved. The payment of interest in advance is inconsistent with it : so are the other conditions sought to be inserted. *Stephen's Law of Evidence* (Article 90) ; *Morgan* v. *Griffiths* (L.R. 6 Ex., 70). The Court will not extend the principle of that case. If any of the conditions alleged are common law conditions there is no necessity for producing evidence of them.

Mr. Close : We admit signing the first document but we say that it did not contain all the terms of the agreement made ; it is simply a memorandum : the conditions not contained in it and which we wish to prove were conditions precedent,

[De Villiers, C.J.: I suggest that the evidence should be admitted now without prejudice to the plaintiff's rights. If there has been a clear agreement that the building should be insured I could not hold that evidence of it is inadmissable.]

Mr. Schreiner: I do not object to that but I submit that the proper procedure in that case would have been an application to have the original document amended.

The Court held that the onus of proof lay upon the defendant.

Abraham Valenski, the defendant, said he had now practically retired. He was owner of the farms which were the subject in dispute. He paid £6,000 for them in 1890. The property was now held by plaintiff and a man named Lipschitz, at a rental of £1,500 a year, payable in advance. The plaintiff had made several offers for the farms. At first he offered £20,000, and then increased this to £25,000, but he told him that he would take £40,000 for it. Finally, a meeting was arranged for the 15th March, when he told plaintiff he would give him the refusal for six months, subject to the payment of £100 in case of non-purchase. He agreed to the drawing up of the document put in, on the condition that no agreement should be considered final until he had consulted his attorney on the following day. A large number of things were discussed that night, and he signed the pencil document on the understanding that a formal contract should be drawn up on the following day. They discussed a large number of questions which were not put down in the pencil document, as he wanted to have the advice of his attorney on these points before coming to a final determination. Amongst these questions were the payment of interest in advance, the insurance of the property, &c. The condition as to payment of purchase money forthwith, or failure to pay instalments, was not discussed on the following day. He refused to sign the contract (B) because the plaintiff refused to allow him to insert any conditions beyond those which were in the pencil memorandum.

Cross-examined: It was understood that on the following day he could put into the contract certain conditions which were not referred to in the memorandum. He was not bound by the memorandum. On the following day he wrote a letter to the plaintiff terminating all negotiations between them. He raised these points about the payment of interest in advance, &c., and because they were not inserted he refused to sign the contract.

Maurice Sabe Lipschitz, co-lessee with the plaintiff and son-in-law of the defendant, corroborated the evidence of the last witness with regard to the drawing up of the memorandum. He would consider that £40,000 would be a good price for the farms.

Maurice Achman, son-in-law of the defendant, said he was present on the occasion when the pencil memorandum was drawn up, and he corroborated what had been said by the previous witnesses.

By De Villiers, C.J.: All the discussion took place before the memorandum was drawn up. Nothing was said after it was signed.

This closed the evidence for the defendant.

Mr. Lind, the plaintiff's attorney, said he prepared the pencil document which had been put in. The discussion of the matter with defendant lasted over three hours, and nothing was said about leaving the final decision until the defendant consulted his attorney. After he drew up the document, he told the parties that he would draw up the final contract early the following morning, and he did so. There was no agreement to pay interest in advance. The matter was discussed fully, but the defendant abandoned that condition. The same thing took place with regard to the insurance of the buildings. Valenski came to his office and desired him (witness) to give him the pencil memorandum, and he refused to do so, but offered to give him a copy. During a short absence from his (witness's) office defendant again called at the office, and succeeded in getting the original memorandum from an office-boy, who had been told to copy it. On returning he (witness) saw defendant taking the original away, and when he tried to get it from him, he (defendant) resisted. Later in the day defendant refused to sign the contract. He was certain that when the pencil memorandum was drawn up there was nothing said about a final decision on certain points until the following day.

Cross-examined: When Valenski asked him to put fresh conditions into the contract, he refused to put them in because he looked upon the pencil memorandum as final.

Johannes van der Westhuyzen, plaintiff, said he was one of the lessees of the farms in dispute. He described the negotiations with Valenski for the purchase of the farms. On the evening when they signed the document, the question of paying interest in advance was raised, but Valenski withdrew the condition before signing the memorandum. The plaintiff corroborated the evidence given by Mr. Lind, and specially denied that the defendant said, on the 15th March, he could not enter into a final and binding agreement then. He gave evidence as to the value of the farms to him.

Mr. Mulder, of Oudtshoorn, said he had been over the farm now in dispute, and estimated the value at between £60 to £70 per morgen for the arable land and £1 10s. per morgen for the vlei veld, making the value for the farm about £46,000. He thought the £10,000 claimed for damages was a very reasonable one.

Cross-examined: During the last three or four years the value of landed property had gone up very considerably, because a Railway Act had been passed, and because of other circumstances. Ostriches were paying very well just now, and that fact had sent up the value of land.

On the question of the value of the farm, Mr. Close called

Carel Jacobus de Jager, who said he owned a great deal of land in the neighbourhood of Oudtshoorn. He had valued the farm in dispute, and said it was worth £19,745 10s. The water rights on the farm were not good. The farm was useful for ostrich-farming, but not for other purposes.

De Villiers, C.J., said that supposing the Court gave damages, the defendant could escape that by simply giving transfer of the farm.

Cross-examined: £20,000 was quite enough for the farm.

Johannes Keyter, jun., sworn appraiser, of Oudtshoorn, said he had made a detailed valuation of the farm Zeekoegat, and estimated it at £17,800.

Cross-examined: If a man got an offer of £35,000 for this farm he ought to jump at it.

De Villiers, C.J., said: This is an action for the specific performance of a contract entered into by the parties on the 15th March. When one reads the whole of the agreement it is perfectly clear that the parties intended by it to enter into a binding contract with each other. Throughout the agreement it says "The said Velenski agrees." The conditions and the mode of payment are given, and the agreement continues, "the purchaser to have the right to pay the whole of the purchase amount or any portion of it, provided such portion be not less than the instalments specified. All costs are to be paid by the purchaser, possession to be given on the 1st of May." The only passage in this agreement from which it might be supposed that the parties did not intend this to be a final contract is the following: "A contract to be properly drawn up, and shall be signed by the parties to-morrow." Now by this I understand the parties to have meant not that anything inconsistent with this contract could be introduced into a new contract, but that anything that might have been forgotten and that was absolutely necessary for the purpose of carrying out the intention of the parties should be inserted into this fresh document, and that this document, instead of being written in pencil and in somewhat loose verbiage, should be couched in legal language and written properly in ink. The question has been raised as to how far evidence is permissible to vary the written contract; but the Court had ruled that only evidence which was consistent with this agreement could be introduced. But even supposing the Court had not taken that view, and had allowed the defendant to give evidence as to further stipulations which he had intended to enter into, then I think it would have been impossible to hold that the defendant has proved his case. Practically, the defendant admits the existence of a contract, and his liability under the contract, and he claims that certain conditions which were not inserted in the draft should be inserted, and these are four in number. The defendant says that it was agreed that interest was to be paid in advance. There is clear evidence that that question was discussed, but Mr. Lind says it was not agreed that interest should be paid in advance, and the fact that the contract was signed without saying anything about that satisfies me that if the defendant wished to have the interest paid in advance, defendant must have foregone that, in consequence of the discussion which took place. The second condition was that the plaintiff should not be allowed to sell the property without the defendant's consent, until the second instalment of the purchase money had been paid. Now, that is directly in conflict with the document itself; the document says that the transfer was to be given at once, on payment of the first instalment. I am satisfied, also, from the evidence that no such condition was agreed to. With regard to the third condition, that the plaintiff should insure the buildings, there is nothing to show that that was finally agreed upon, although it was discussed. Then there is the fourth condition, and that was that in the event of the plaintiff failing to pay any instalment of the purchase price or the interest, the whole of the purchase money should become due ana payable forthwith. This the defendant admits was not discussed at all, and if it was not discussed I do not see how it could be inserted into this document unless it was absolutely necessary for the purpose of making that document a formal one. It is clear that under the circumstances the plaintiff is entitled to the specific performance of the contract, and that the first two prayers of the declaration must be granted. The Court must declare that the contract embodied in the memorandum was a valid and binding one, and must grant an order compelling the defendant to duly execute the formal contract. In regard to damages, the defendant can avoid the payment of damages by complying with the order of Court. There is no desire to compel him to pay any damages. If he does not comply with the order of Court then there will be the question of whether the Court will commit him for contempt. It is usual, however, to fix an amount as damages in case of refusal to comply with the order of Court. The Court in such cases has never gone very minutely into the question of damages sustained, but has taken a round sum for the purpose of enforcing its own judgment. I think the £10,000 claimed is excessive, and that justice will be done if £5,000 is given. Therefore, should the defendant refuse to sign the contract payment of the sum of £5,000 will be ordered, the defendant to pay all costs.

Mr. Schreiner requested that the plaintiff might be allowed the costs of witnesses who had been brought to give evidence as to the damage, and this was allowed.

Plaintiff's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.

STANFIELD AND ANOTHER V. JORDAN AND ANOTHER. { 1898. Aug. 22nd.

This was an action for £140 damages brought by D'Arcy and Eva Stanfield, variety artistes, against Jordan and another on the ground of wrongful dismissal from their employment. The defendants denied the wrongful dismissal and alleged that the contract had been terminated by mutual agreement. In the alternative they justified the dismissal on the grounds of the misconduct of the plaintiffs.

Mr. Benjamin appeared for the plaintiffs, and Mr. Close for the defendants.

Dr. Arderne Wilson, of Cape Town, stated that on July 2, this year, about four p.m., the plaintiffs came to him. The lady was highly agitated, and complained of having been assaulted. There was a bruise on the right fore-arm, and he forbade her performing that night. She was certainly not intoxicated on that day, nor any other on which he had seen her, and he had frequently seen her in attending her child.

D'Arcy Stanfield stated that he and his wife were the plaintiffs. They had performed with the defendants in Australia for six months, and were employed there for a similar term in South Africa, to commence about March 1. They opened in Durban on March 2. There was no clause in the contract regarding notice before the end of the tour. They arrived in Cape Town on June 21, and on Saturday, July 2, Mrs. Jordan assaulted his wife. They then left the tent. On the following Monday he went to the tent, and Mr. Jordan said he would not let them perform again if he could help it. Jordan said his reason was that they had absented themselves on the Saturday and had broken the contract. Witness pointed out that his wife could not appear owing to the assault, and he could not give his turn without her assistance. He had never agreed to terminate the agreement. It was untrue that his wife was ever intoxicated. The contract had two months to run, and the joint salary was £17 a week. Not being able to get anything to do in Cape Town, they organised a small company and gave six performances in the Good Hope Hall, which resulted in a loss. They wanted to get to Australia, but had no funds. Since the last application to the Court an offer of £34—a fortnight's salary—had been made by the defendant, but he could not accept it.

Mr. Close said defendants' attorneys had cabled to their clients, and they had wired back an offer of a fortnight's salary.

Cross-examined: He had not made arrangements to leave the company prior to the breaking of the contract. He had not advertised for a pianist with the object of making a tour of South Africa. Jordan dismissed them on the Monday night because they did not appear on the Saturday evening. It was not true that he went down to the tent on Monday afternoon and took away his property.

Mrs. Eva Stanfield, wife of the last witness, said her husband could not perform alone. The statement made by her husband was quite correct.

By De Villiers, C.J.: She was looking through the peep-hole at the audience when Mrs. Jordan rushed at her, and struck her over the eye with a tin dish. The allegation of intoxication was untrue.

Henry Butler, police sergeant, said on July 2 Mr. and Mrs. Stanfield laid a charge of assault. The latter was perfectly sober.

Mr. St. Leger Seaton, of the Johannesburg Hotel, said the plaintiffs stayed at his hotel. On the 2nd July Mrs. Stanfield returned to the hotel. She was not intoxicated. During the time they had stayed at the hotel Mrs. Stanfield had not indulged in intoxicants.

Mr. Close said the defendants had undertaken to return to Cape Town in November and asked for postponement of the further hearing until then. If the plaintiffs would give some security they would be prepared to pay now the sum of £34, providing they would repay it in case the action went against them. The sum of £206 had been lodged in court for the purposes of the case.

De Villiers, C.J., asked if the plaintiffs would be satisfied with half of their claim.

Mr. Benjamin replied that they would rather accept that than have the case postponed.

De Villiers, C.J., said all the rules of the Court had been complied with, and the defendants ought to have been present. They could not be allowed to leave these people stranded here. The charge of intoxication seemed to have fallen to the ground, and the defendants were not present to support it.

After argument by Mr. Close,

De Villiers, C.J., said: The defendant received notice that this action was coming on, and he chose to leave the country, and allow the plaintiffs to be brought here to bring their action. He ought to have taken care that he was properly represented, and that some evidence was forthcoming. The defendant has had notice, and no evidence has been given. On behalf of the plaintiffs there is clear proof that there was no intoxication on the part of the female plaintiff, and that they were summarily dismissed on July 2. Clearly they are entitled to some damages. They are prepared to take £70, which is half the amount claimed, and I think that amount should be given. It has been said that the Court should not give damages for more than two weeks' wages, because the defendant was entitled to give two weeks' notice. If the two weeks' notice had been given, no doubt the defence might have been relied upon, but no notice was given. The plaintiffs were summarily dismissed, and the defence that the two weeks' notice was given has not been raised. I think that if the Court gives the plaintiffs four weeks' salary, which would be about £70, that will meet the justice of the case. The judgment of the Court will be for £70 and costs.

[Plaintiffs' Attorneys, Messrs. Scanlen & Syfret; Defendants' Attornys, Messrs. Minchin & Sonnenberg.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

MACELLI V. MACELLI. { 1898. Aug. 23rd.

This was an action for divorce brought by Marie Elizabeth Macelli against her husband, Jacobus Macelli, on the ground of his adultery.

Mr. Gardiner appeared for the plaintiff; the defendant did not appear.

The plaintiff said she was married to the defendant in 1891, and she recognised her signature to the marriage certificate which had been put in. Her husband had left her, and was living in Cape Town with another woman, who had taken the name of Macelli.

The Rev. Thomas Fred. Dreyer said he had visited the defendant recently, and found him living with another woman. Defendant said he had two children by the woman he was now living with.

This was all the evidence, and a decree of divorce was granted.

[Plaintiff's Attorney, J. C. de Korte.]

KRYNAUW AND ANOTHER v. WIUM.

1898.
Aug. 23rd.
Nov. 2nd.

Water-rights.

This was an action for declaration of rights. The plaintiffs were Willem Johannes Krynauw and P. P. du Toit. The defendants were T. C. Wium, I. D. de Wet, and P. C. B. le Roex.

The plaintiffs' declaration was as follows:

1. The parties to this suit, except the defendant De Wet, are registered proprietors of portions of the farm Eendracht, in the division of Worcester.

2. The defendant De Wet has recently purchased from the defendant Wium part of Wium's portion of the said farm, and De Wet and Le Roex are joined as defendants in order that all persons having proprietary interests in the said farm may be before the Court for the purposes of the declarations of right hereinafter asked for, but no costs are asked for against the said two defendants.

3. In the year 1877 the said farm was owned in undivided shares by J. P. A. Hugo, J. P. P. Hugo, and the widow of Gabriel J. Hugo, and on the 6th day of October, 1877, they entered into an agreement relative to the subdivision of the said farm, of which agreement a true translation is hereunto annexed and marked X, to the terms of which the plaintiffs crave leave to refer this Honourable Court.

4. Partition transfers of lots A, B, and C, referred to in the said agreement, were passed to the aforesaid owners in conformity therewith.

5. Subsequently, on the 27th day of May, 1881, J. P. Hugo, Pieter Barend Hugo, and Willem V. de Kock were joint owers of lot A, and they entered into an agreement on that date relative to the sub-division of the said lot A, of which agreement a true translation is hereunto annexed and marked Y, to the terms whereof the plaintiffs crave leave to refer this Honourable Court.

6. Partition transfers of portions of lot A were passed to the aforesaid owners, in conformity with the said agreement.

7. It is unnecessary in this declaration to enumerate in detail all the various changes of ownership of parts or portions of the said farm which have taken place, it being sufficient to say that: (*a*) Lot A, which is the upper portion of the said farm, is now owned in subdivided portions by the plaintiff Krynauw as successor to J. P. Hugo, and by the defendant Wium, who is the upper proprietor, as successor to Pieter Barend Hugo and Willem V. de Kock, and has, as before stated, sold part of his portion to the defendant De Wet; (*b*) lot B, which is the middle portion of the said farm, is now owned in subdivided portions by the plaintiff Krynauw and the defendant Le Roex; and (*c*) lot C, which is the lower portion of the said farm, is now owned by the plaintiff Du Toit.

8. From time immemorial, before and since and in the year 1877, there were upon the said farm two springs of water, which furnished, and still furnish, a perennial supply of water to the stream flowing for the use of the several owners of the said farm. These springs rise upon the part of the farm described as lot A, and upon that portion thereof now owned by the defendant Wium, and to the water from the said springs the plaintiffs are entitled during their respective periods or turns of water-rights and water-leading as defined by the agreement marked X, and (as to the plaintiff Krynauw as owner of portion of lot A) by the agreement marked Y, and the plaintiffs and their predecessors in title have lawfully had and enjoyed the use of the water of the said springs during the said periods or turns until recently, when the defendant Wium wrongfully and unlawfully laid claim to the sole and exclusive use of the said water, and has wrongfully and unlawfully, in furtherance of such claim, prevented or attempted to prevent the plaintiff Krynauw, as owner of portions of lots A and B, and the plaintiff Du Toit, as owner of lot C, from making any use of the water of the said springs, and from the lawful use of Botha's Dam and the upper watercourse hereinafter more fully referred to.

9. In addition to the aforesaid springs, and near the second spring rising as aforesaid, there was at all times, before, since, and in the year 1877 a perennial source of supply to the said stream derived from certain vlei ground, whence water known as "lek" water, or soakage, at all times, until recently, perennially came into the said stream, together with the water of the said second spring, and the plaintiffs were and are in like manner and to the like extent, as set forth in paragraph 8, entitled to have and enjoy the use of the said "lek" water or soakage under the agreements marked X and Y, but the defendant Wium has recently wrongfully and unlawfully laid similar claim to the sole and exclusive use thereof, and has wrongfully and unlawfully, in furtherance of such

claim, similarly prevented or attempted to prevent the plaintiff Krynauw, as owner of portions of lots A and B, and the plaintiff Du Toit, as owner of lot C, from making any use of the said "lek" water or soakage, or of the aforesaid dam and watercourse.

10. Botha's Dam aforesaid is the dam mentioned by that name in the agreement marked X, and before, in, and since 1877 the lower proprietors on the said farm have at all times until recently made use of the said dam for the purpose of catching water led therefrom for a period far exceeding thirty years by a furrow, hereinbefore called the upper watercourse, across lot A to lot B, down to lot C, and the plaintiffs, as owners of lot B and lot C respectively, claim to be entitled to the continued use both of Botha's Dam and of the said upper watercourse for catching and leading water during their respective periods or turns of water-right and water-leading, but the defendant wrongfully and unlawfully contends that the plaintiffs are not entitled to such use of the said dam and watercourse, though admitting the right of the plaintiff Krynauw to the use thereof for certain purposes as owner of portion of lot A.

11. The defendant Wium, moreover, wrongfully and unlawfully contends that he is not bound to permit the plaintiffs, or either of them, to make, in conformity with the terms of the agreement marked X, new furrows across his portion of lot A for the conveyance of their water for use upon Krynauw's portions of lot B and upon lot C respectively, which cannot be placed under irrigation by water led from the main watercourse referred to in the said agreement, and the plaintiffs claim, if this Honourable Court should find that they are not entitled to the use of the upper watercourse aforesaid, but not otherwise, an order compelling the defendants Wium and De Wet to permit a new furrow or furrows to be by the plaintiffs constructed, as provided in the said agreement, across the portion of lot A now registered in the name of the defendant Wium, for the use of the plaintiffs respectively in irrigating land upon lot B and lot C, which cannot be irrigated from the main watercourse aforesaid.

12. The plaintiffs have sustained damages by reason of the wrongful and unlawful acts of the defendant as set forth in the premises in the sums of £75 and £25 respectively. Wherefore the plaintiffs pray for: (*a*) A declaration that they are respectively entitled to the sole and exclusive use of the water of the said springs, and of the said "lek" water or soakage, during their respective periods or turns of water-right and water-leading for the portions of lot A and lot B, owned by the plaintiff Krynauw, and for lot C, owned by the plaintiff Du Toit, respectively; (*b*) a declaration that they are respectively entitled to the use of Botha's Dam, and of the upper watercourse leading therefrom across lot A and lot B down to lot C during their respective periods or turns aforesaid, or if this Honourable Court should hold that they are not so entitled to the use of the said upper watercourse, then they pray for (*c*) a declaration that they are respectively entitled to construct a new furrow or furrows across lot A for their respective use in irrigating parts of their land in lot B and lot C, which cannot be brought under water from the aforesaid main watercourse; (*d*) an interdict restraining the defendant Wium from preventing them from using and enjoying their rights as declared by this Honourable Court; (*e*) judgment for £100 as damages against the defendant Wium; or that they may have such further or other relief in the premises as to this Honourable Court may seem meet, together with costs of suit against the defendant Wium.

Annexure X to the Plaintiffs' Declaration.

Be it hereby known that we, the undersigned, J. P. A. Hugo, J. P. P. Hugo, and the Widow Gabriel J. Hugo, owners of the farm Eendragt, in the field-cornetcy of Wagenbooms River, district of Worcester, have agreed to divide the said farm between us, so that each one may mark off his or her share from the other by beacons on the ground and shall possess separate right to the water. We declare by these presents to consent to, accept, and regard as binding upon each one of us, the divisions of both ground and water, with conditions and provisions belonging thereto, made on 12th August of this year by Messrs. P. B. Botha (F.son), P. B. Botha (P.son), and A. H. du Toit, as shall be found to be described herein, desiring, accordingly, that in due time transfer shall be granted to each one of us, as per separate diagram.

Divisions as above indicated of the grounds and water of the farm Eendragt, made on the 12th August last, by the said Messrs. Botha and Mr. Du Toit: To J. P. Hugo shall be assigned the lot marked B; to J. P. P. Hugo shall be assigned the lot marked C; to the Widow G. J. Hugo shall be assigned the lot marked A, with proprietary right to water, and the conditions and provisions belonging thereto as will now be found described.

1. The owner of lot A shall have the full stream for his sole and exclusive use from Sunday evening, ten o'clock, till Wednesday evening, six o'clock. The owner of lot B in the same way from Wednesday morning, six o'clock, till Friday morning, six o'clock. The owner of lot C in the same way from Friday morning, six o'clock, till Sunday afternoon, two o'clock, and such during each week in the year; further, the remainder of Sunday's water, that is, from two o'clock p.m. till ten o'clock p.m., shall be the property of lot B every week.

2. The division just described shall be strictly observed during each week from the 1st October till the 15th May every year, and during the rest of the year division shall be made with the mutual consent of the owners.

3. All the work, placing of water-valve costs, &c., connected with the damming up and leading of the water from the large division dam in the kloof, known as the dam of the farms Eendragt, Wijzens Drift, and Oliphant's Berg, shall be borne and defrayed by the owners jointly.

4. At the beginning of each turn described under Article 1, the owner shall be bound to fetch his or her water personally, or to have it fetched by certain dams on lots A and C, the location of which is still to be determined by the aforesaid Messrs Botha and Mr. Du Toit, the first of which shall be known by the name of Botha's Dam, and the second by the name of Du Toit's Dam. The owner of lot B shall consequently have to fetch his water from Botha's Dam on lot A, and the owner of C from Du Toit's Dam on lot B. The owner who last used the water shall see that, at the beginning of the hour of his successor, water is obtainable from that dam, where, as described in this article, the successor must receive the water; further, the said owner who last used the water shall be bound, immediately at the beginning of his successor's turn, to remove all dams or obstructions laid by him or her in the large furrow for his or her use, to give the water a free and unhindered course.

5. One or more of the owners refusing, after due notice, to render his or their assistance in carrying out the work defined in Article 3 shall be liable to a fine of £1 (one pound sterling), for the benefit of the working owner or owners.

6. The furrow out of the large dam described in Article 3, as far as the dividing line of lot C, shall be kept in order by the joint owners; and in default of the same by one or more of the owners, the provisions determined under Article 5 shall be applicable. The said furrow shall remain and continue with a view to being used, and can only be removed with the consent of all the owners.

7. The owner of lot C and the owner of lot B shall each have the right to make new furrows from the large furrow described in Article 1 over one or more of the upper parts, to lead his or her water, without, however, giving up his right to the said large furrow, provided that the object indicated by the new furrow or furrows cannot be attained by the aforesaid large furrow; provided, also, that the higher owner or owners be held free from any costs incurred by the making or maintenance of the said new furrow or furrows, also from any damage that might be caused to the higher owner or owners by the running of the water in the same.

8. Each of the owners. during the time under Article 1 when he or she has the large stream at his or her disposal, shall be held and bound to give 1 inch of water to each of the other owners for household purposes, with this understanding: that the sluice for the reception of 1 inch of water be laid and kept in repair by each owner at his own cost, with the exception of the 2-inch sluice on lot A, for the benefit of B and C, which shall be made and kept in repair by all the owners jointly. At Botha's Dam there shall therefore be two sluices made, one of 2 inches for B and C and one of 1 inch for A: and at Du Toit's Dam also two sluices shall be made, both of 1 inch, for B and C.

9. The spring rising on lot B shall be the joint property of the owners of lots B and C, the first mentioned to use the water from Sunday evening, six o'clock, till Thursday morning, six o'clock, and the latter the last half of the week, and such during each week in the year. This division of both ground and water, with conditions and provisions, having been approved and accepted by us of our own free will, we declare by these presents to be satisfied with the same in every part, wishing and desiring that it shall be strictly adhered to in all its particulars and be regarded as effective.

Annexure Y to the Plaintiffs' Declaration.

We, the undersigned, Jacobus Petrus Hugo, Pieter Barend Hugo, and Willem V. de Kock, joint owners of certain two pieces of perpetual quitrent ground, situate in the district of Worcester, in the field-cornetcy of Wagenbooms River, in extent 722 morgen and 468 square roods, and 39 morgen and 5 square roods respectively, hereby declare to have agreed to divide our said properties between us, as follows :

The shares of the said Jacobus Petrus Hugo shall be surveyed by a surveyor, and diagrams made of the same, and so they shall be transferred to him as his own and separate shares; the rest of the two pieces shall remain in the joint possession of the other two proprietors.

The division of the larger piece shall be made as follows: The line shall run from the north line beacon, in a southern direction between the "opstal" and a certain building situate there; further in a south-easterly direction in such manner that the ground shall be divided into two equal portions, when the southern portion shall fall to the said Jacobus Petrus Hugo.

The division line of the smaller piece shall run straight from north to south, dividing the said ground in two, of which the one half, bordering on the ground of Jacobus Petrus Arnoldus Hugo, shall belong to the said Jacobus Petrus Hugo.

Further, to the said Jacobus Petrus Hugo shall fall half the water appertaining to the said properties under the contract passed on the 6th October, 1877, by Jacobus Petrus Arnoldus Hugo, J. P. P. Hugo, and the Widow Gabriel J. Hugo, and that from two o'clock on Tuesday morning till six o'clock on Wednesday morning; and he shall have the right to dam up or lead the water just above the place where the stream divides into two, as indicated on the diagram.

The said Jacobus Petrus Hugo shall further be subject to the provisions and conditions of the said contract.

The costs of surveying shall be borne by the parties in such manner that the said Jacobus Petrus Hugo shall pay one-half thereof and the other two the remaining half.

For the prompt execution of which we hereby give our persons and our property as security.

The defendant Wium filed the following plea :

1. He admits the allegations in the first seven paragraphs.

2. There are several springs upon lot A of the said farm, and in the absence of any plan annexed to the declaration, or of any accurate description of the two springs referred to in the eighth paragraph, it is not possible to plead with certainty to the allegations in the said paragraph contained. But there are two springs which rise in the defendant's vineyard above the watercourse running from Botha's Dam aforesaid down to lots B and C; these two springs were opened by the defendant in or about the years 1887 and 1893 respectively—they did not exist before the defendant dug for water and opened them up; the defendant has since the said dates sold certain right of user in connection with the water of the said springs to the defendant De Wet, and has in other respects used and dealt with the whole of the water from the said springs as his property, as he had a right to do. The water from the said springs does not run, and never has run into the watercourse aforesaid, and is not dealt with by the said agreement X. Subject to the above, the defendant denies all the allegations in the eighth paragraph of the declaration.

3. As to the ninth paragraph, he denies that he has ever contested the right of the plaintiffs to a due and lawful use of the soakage or "lek" water therein referred to. He has not, nor does he now, claim the sole and exclusive use thereof, nor has he prevented the plaintiffs from making due use of the said water during their turns of water leading. As to the dam and water course in the said paragraph mentioned he refers this Honourable Court to the matters set forth in paragraph 4 of this plea.

4. As to the tenth paragraph, he says that he admits the right of the plaintiffs to the use of Botha's Dam referred to in the said agreement X, and to the watercourse leading therefrom. There is another dam in the said watercourse lower down than Botha's Dam, and also upon lot A, from which the defendant leads water by a furrow running close past his house. He denies that the owners of lots B and C are entitled to the use of this latter furrow, which has been constructed and used solely by the defendant or his predecessors in title. Subject to the above, he denies the allegations in the tenth paragraph of the declaration contained.

5. As to the eleventh paragraph, he says that the plaintiffs claim from him the right to make a furrow leading from the main watercourse through the upper portion of his vineyard, and close to his house, and thence over lot B and on to lot C. The making of the said furrow will cause him very great loss and damage, and will ruin his vineyard, and the plaintiffs have not offered to guarantee him against such loss. He is, and always has been, ready to recognise the rights of the plaintiffs under the said agreement X; but he says that a furrow can be taken out at another place, as the plaintiffs well know, which will serve the same object as the one demanded by them; or otherwise, that the same object can be attained by the use of the existing main watercourse. He has duly pointed this out to the plaintiffs. Subject to the above, he denies the allegations in the eleventh, and also all the allegations in the twelfth paragraph of the declaration.

Wherefore he prays that the plaintiffs' claim may be dismissed. with costs.

The replication was as follows:

1. As to paragraph 2 of the plea of defendant Wium, the plaintiffs say as follows: (*a*) The two springs referred to in paragraph 8 of the declaration are situated one above and one below the said defendant's present new vineyard; (*b*) the said defendant has recently claimed and exercised an exclusive use of the water of the said springs, and the plaintiffs have before action brought protested to the said defendant against such claim and exclusive use; (*c*) they admit that a few years ago the said defendant did open up the said springs by deepening the courses thereof, and by collecting the "lek" water, or soakage, in the immediate neighbourhood, but they say that the supply of water from the said springs to the watercourse conveying the plaintiffs' water was not materially increased by the said operations of the said defendant beyond what it had heretofore been, and that the said defendant was not, and is not entitled to deprive them of the use of the water flowing from the springs so opened up during their respective turns or periods of water-leading; (*d*) the said defendant had and has no right to sell any rights of user to the said water to the defendant De Wet or any other person so as to interfere with the rights of the plaintiffs as aforesaid, and the plaintiffs are no parties to any such sale; (*e*) save as aforesaid, the plaintiffs deny the allegations in paragraph 2 of the plea of the said defendant.

2. As to the paragraphs 3 and 4 of the said plea, the plaintiffs say as follows: (*a*) Before action was brought said defendant did contest the plaintiffs' right to a due and lawful use of the "lek" water, or soakage and did prevent them from making such use thereof; (*b*) the dam referred to in paragraph 4 of the said plea as "another dam lower down than Botha's Dam" is, in fact, Botha's Dam referred to in agreement X. and the watercourse leading therefrom and running close past the said defendant's house is the "upper watercourse," to the use of which the plaintiffs lay claim in paragraph 10 of the declaration; (*c*) they deny the other allegations in paragraphs 3 and 4 of the said plea.

3. As to paragraph 5 of the said plea, the plaintiffs say as follows: (*a*) They have not claimed from the said defendant that the new furrows must run in any special course as is alleged by him for conveying water for their use on lot B and lot C, but they claim that a suitable course or courses for the new furrow or furrows must be assigned, whereby and wherefrom the new land which they, and especially the plaintiff Du Toit, lawfully desire to cultivate, may be irrigation with the least possible inconvenience to the said defendant; (*b*) they are willing to pay compensation for any damage which the defendant may sustain by reason of the construction of such new furrow or furrows, but the said defendant has never before action brought offered to permit such furrow or furrows to be constructed if compensation be paid to him as aforesaid; (*c*) they deny the other allegations in paragraph 5 of the said plea.

4. Save as aforesaid, and save in so far as any of the allegations in the declaration are admitted in the said plea, the plaintiffs deny all allegations of fact and conclusions of law therein contained, join issue thereon with the said defendant, and again, as before, pray for judgment with costs.

The defendant Wium rejoined generally.

Mr. Schreiner, Q.C. (with him Mr. Gardiner), appeared for the plaintiffs.

Mr. Innes, Q.C. (with him Mr. Buchanan), for the defendant Wium.

The other defendants were in default.

Charles John Pritchard said he was a Government land surveyor, and had prepared a plan of the furrows in dispute from actual survey. P. B. Hugo and C. B. le Roux pointed out Botha's Dam to him. It was only a diverting dam and not a collecting dam. There was no "lek-water" now.

A. H. du Toit said he was one of the arbitrators who divided Eendracht. He fixed Botha's Dam at the spot marked in Pritchard's plan; that was the spot where the arbitrators fixed it. He had pointed it out on the 30th August last.

Jacobus Petrus Philippus Hugo said he was owner of Eendracht when it was divided. The old dam was below Rondekop just above Wium's house; the water was divided there, some went into the upper furrow, some into the lower. He always used the water from the upper furrow in his turns of water leading. The vineyard was not there at the time.

Cross-examined: He never used the full flow of the upper furrow. He did not object to Wium using the spring water.

Johannes Christian Petrus du Preez said he lived on lot C in 1873: he remembered the arbitrators being on the farm in 1877. There was no other dam besides the one at Rondekop. The upper furrow came down to lot C. He aided Mr Hugo on his farm, and he used the water of the upper furrow freely when Mr. Hugo required it in summer. The old water-course ran between the springs, the deviation *b* to *n* was new. The springs furnished some supply of water. On lot C the water was used for distilling and watering trees.

Cross-examined; Witness often led water out of Du Toit's Dam. The terms of document X were not strictly adhered to. There never was a dam at Amandelbosch. The "lek-water" went into the veld.

P. S. du Toit said he was formerly proprietor of the land now owned by the plaintiff Krynauw. He had never asked the upper proprietor for leave to use the water during his turn. He took the water from the dam at Rondekop, not at Amandelbosch. The dam at Rondekop was pointed out in 1887 as Botha's Dam Witness knew the site of the springs. There must have been water there which must have gone to the furrow. The water of the springs must have come from the same furrow higher up. The owners of lot C used the water by the upper furrow at the time and used it as of right.

Cross-examined: The water of the upper furrow stopped on lot C.

G. J. Hugo said he was born on lot B, and was there when the property was divided. He knew Olifant's Berg Dam: the next dam to that was Rondekop Dam, which was known as Botha's Dam. The "lek-water" used to go to the furrow.

Cross-examined: The lower channel was the main furrow. The upper furrow was meant for leading water to lot A. Lots B and C both used to take the water through the lower channel. The brothers at that time used to allow one another to use their respective furrows.

Pieter Barend Hugo said he was born at Eendracht and remembered the division. He corroborated the former witnesses as to the position of Botha's Dam. The upper furrow and the main furrow flowed from it. Before defendant drained the ground the water all flowed into Botha's dam.

Schalk Johannes Rabie said he accompanied plaintiff's attorney when going to see defendant about a new furrow. Defendant asked him where a furrow could be given as the upper furrow caused him injury. A furrow made according to Greeff's plan could not enable plaintiff Du Toit to bring any new land under cultivation,

Philippus Petrus du Toit said he was one of the plaintiffs. In 1895 Wium told him to come and clean out his sluit. Wium pointed out the furrow, but witness said it was not his furrow: he found that Wium had turned water off at Amandelbosch: witness never gave his consent to this. Witness assisted in making part of the deviated furrow. On 25th December, 1897 he found his water turned off, and told defendant not to do it again. Again in January, 1898, he found the water turned off at the cross-cut, from that date the defendant had prevented him from having sufficient water. He had suffered £25 damages.

Willem Johannes Krynauw, one of the plaintiffs, said that until January, 1898, he had used the upper furrow without defendant's consent. After the furrow had been charged he assisted in making the current and used the water coming through it into the upper furrow. In February, 1898, the water was turned off and he asked defendant why he had done it. Defendant at first denied knowing anything about it and then told him he would not let him have another drop of water in the sloot. He had suffered £75 damages.

Pieter Carel Botha Le Roux, said he was one of the owners of lot B and a defendant. He had no interest in the upper furrow. Corroborated previous witnesses as to Botha's Dam. In 1895 a deviation was made. Wium explained what was to be done. Du Toit said "He will lose too much water in this way." Wuim said, "Then I will make a furrow across so as to collect all the fountain and soakage water into the main furrow. That has never been done." The water of these springs comes from the direction of the main stream.

Cross-examined: I was satisfied that the water should be turned down the cross-cut.

J. P. S. Dietliff corroborated the evidence as to Wium's refusal to turn down the water.

This closed the plaintiff's case.

For the defence,

Gert Greeff, a land surveyor put in a plan which he had framed from actual survey of the furrows in dispute. Old Mr. Botha pointed out Botha's Dam as being near Amandelbosch. He also pointed out Du Toit's Dam. The main body of water runs in C E F in my plan. At G there is guttering for carrying water down the furrow. That is the water from the two springs. The "lek-water" is leakage from the old sloot.

Cross-examined: The point where I propose to begin the new furrow is just opposite Wium's house; it is at the point *n* in Pritchard's plan.

Pieter Barend Botha said he was one of the arbitrators to divide the water in 1877. One of them was dead. Botha's Dam was at point B on Greeff's plan. The owners were present when this dam was fixed. He had known the farm for sixty-two or sixty-three years. The main watercourse was M C E F. In 1877 B and C had one furrow and A had another, viz.: the upper furrow. The furrow would damage the vineyard if used for the plaintiff's purposes.

Postea (November 2nd.)

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice MAASDORP.]

Mr. Gardiner (with whom was Mr. Upington) appeared for the plaintiffs.

Mr. Innes, Q.C. (with whom was Mr. Buchanan), for the defendant.

Theunis Christoffel Wium, farmer, residing at Eendracht, division of Worcester, deposed that last year he sold a part of the portion of Eendracht he owned to the defendant De Wet. When witness purchased the land there was no vineyard at the place marked on the plan. There was then water running along the dotted line where the vineyard was now. The two fountains, A A and B B, were not there then. Witness had, in 1887, opened the fountain A A in consequence of what a man named Hillyer told him. There was no indication of water being there before witness commenced digging. The water soaked out from the direction of the mountain. Witness used the water for his vegetable garden, leading it there by way of Rondekop. He used it for years in that manner, and none of the occupiers of the other lots made any objection. Witness had had the furrow at M filled up, and for two years it was dry. Witness came across the spring B B while he was trenching. To witness's knowledge there had never been water there before. Witness had only turned the spring water into the furrow when it was his own turn for water leading. At one time Krynauw offered witness £200 for the two springs. The opening of these springs had in no way diminished the supply of water in the main furrow. The water of both the springs came from the mountain. No one had ever challenged his right to the water from those springs until last Christmas. When witness sold a portion of his land to De Wet in April, 1897, he did not know that his right to the spring water was challenged. The opening of these springs had not diminished the stream of "lekwater," or in any way affected that water. Witness detailed the state of affairs when he bought his portion of the farm. He had known Botha's dam for forty years. In connection with the main furrow, witness denied that the other occupiers of lots had any right to use the cross-cut. That was not according to the agreement. Witness objected to a furrow being taken out above the vineyard, as it would injure his vineyard considerably.

Cross-examined: When he cut off the furrow at M he told the other occupiers, but he did not get their consent, because that was not necessary, it not being the main furrow. He denied having promised plaintiffs a cross-cut. He also denied that when the deviation was completed his son said: "Now the lower proprietors are nicely humbugged." If plaintiffs' witnesses had said there were springs there before witness bought the ground, then those springs must have crawled away again. Witness had offered to have the upper watercourse dammed up for three months to show that the water in the upper spring did not come from there.

Mr. Innes said that he had letters, which he would refer to in argument, to show that an offer had been made on behalf of his client to cut off the water in the upper furrow for the purpose of seeing if the spring water came from there. It was supposed that a couple of days would be sufficient to test that. The plaintiffs, however, replied that they could not spare the water.

The Chief Justice asked Mr. Gardiner what was the objection to a water furrow at L.

Mr. Gardiner said it would give them no more land under cultivation. If they got the upper course it was higher, and they could cultivate more land.

Mr. Innes said that his client had no objection to any furrow so long as the vineyard was not injured. They might lay pipes.

Mr. Gardiner said they were always willing to do that provided some impartial person certified that such pipes were necessary.

The Chief Justice suggested that Mr. Innes should consult with his client as to the furrow and conditions he would agree to.

On resuming after lunch,

Mr. Innes said he had, as suggested by the Court, conferred with his client. Their only real objection was the fear of injury to the vineyard. If the plaintiffs were prepared to lay pipes of such length as would prevent such injury, his client would have no objection to any furrow. It was necessary for the defendant, however, that there should be an open furrow as well as the pipes, because he wanted the water during his own time of waterleading. The pipes could, therefore, either be laid along the bed of the furrows or close by, and covered with several feet of soil if desired.

Mr. Gardiner repeated that his clients were willing to lay the pipes if that should be found necessary by some impartial person.

The Chief Justice having intimated that he would hear further evidence with regard to the springs,

William Hillyer, employed in the Government Railway Department at Touw's River, said that he was in charge of water-boring operations, and had had twenty-two years' experience in that direction. In 1886 or 1887 he indicated a spot on defendant's ground where water might be found. Last August he again went out to the farm, and found there a vineyard which was not in existence at the time of his previous visit. On the upper portion of the vineyard he found a fountain (A A on the plan), which was on the identical spot he pointed out in 1886 or 1887 as a likely place for water to be found. There was no fountain there at the time of his first visit, nor were there any indications of any fountain in the neighbourhood.

Cross-examined: Witness went by his own indications in assuming the presence of water near there. He went by the vegetation, the presence of a certain bush, and by stones. They were indications of his own, but other people went by them; Mr. Bain used to.

In reply to the Chief Justice, Mr. Innes said he had abundant evidence to show that the presence of the furrow above the vineyard would injure the vineyard.

After argument,

De Villiers, C J., said: In deciding this case the Court must bear in mind that the land in respect of which these rights are claimed belongs to the defendant. He is the owner of the land, and is entitled to dispose of that land as he chooses, and use the land as he chooses, and if any lower proprietor claims water rights on that land he must clearly and distinctly prove his claim. If that is borne in mind throughout the case, I think it must be considerably simplified. First of all, with regard to the springs, it is a rule of law that every person is entitled to water arising upon his land, unless that water has been a source from which a perennial stream has flowed to the lower proprietors. In my opinion, there is not sufficient evidence to show that the two springs A A and B B constituted a source of any material portion of the water which is now in dispute, I am satisfied that, at times at all events, not a drop of water came from those springs, and so increased the water supply of the lower proprietors. The witness Hillyer says that when he first visited the farm there was no water flowing from A A at all, and the evidence of the defendant is to the same effect. As to the spring at B B, the defendant says that that was only discovered while he was trenching the ground for the vineyard. Even the evidence for the plaintiffs, quite independent of that for the defendant, does not satisfy me that these two springs formed a part of the source of the perennial stream which supplies also the lower proprietors. That being so, the defendant, as owner of the land, had clearly a right to whatever water rises upon his land, and which does not form part of the supply of a perennial stream It is quite probable, as the defendant states, that the water comes from the mountain, but wherever it comes from it does not constitute part of the water of the perennial stream, and the defendant is therefore entitled to the water. Under these circumstances the claim for an interdict restraining defendant from using that water must fall to the ground. With regard to the so-called "lekwater," that seems a very unimportant matter. It does not appear that any material quantity of that water has been diverted, or that the defendant has objected to the use of the "lekwater" by the plaintiffs. Therefore in the judgment this Court is bound to give it must be clearly understood that the only reason why judgment in respect to the "lekwater" is not given against the defendant is that there is an admission on the defendant's part that the "lekwater" belongs to the plaintiffs as well. That disposes of the springs and the "lekwater." The more material question is in regard to the water furrow. The plaintiffs claim the right to the furrow at G H B, and they also claim that the point H is Botha's dam, and that it is the dam which is provided for in the agreement between the parties. Everything almost hinges upon this question as to whether or not H is the original Botha's dam, because it was provided by the agreement that a dam should be pointed out by Botha and Du Toit, and that that dam should be the connecting dam for this farm. In my opinion Botha's dam can only be sought for in the main stream, for we cannot suppose that Botha's dam would have been made in any branch stream. Therefore the important question is: What is the main stream? In my opinion the main stream is the one marked main watercourse, which passes through B, E, L, and K, and further on is called the main watercourse. That is originally the flow of the water, because, although no doubt there is some evidence to show that the water flowed more naturally in the direction of E or H, in point of fact the water which flows in this main watercourse is larger and more natural. In my opinion Botha's dam must be set over the natural main watercourse. Of the three persons who could speak with certainty as to the position of this dam, one is dead, and of the other two, one places the dam at H and the other places it at B. In my opinion the manner in which Botha himself gave evidence, satisfies the Court that Botha's dam was at B. Then if that be so the great part of the plaintiffs' case falls to the ground, because their right to the so-called upper watercourse mainly depends upon establishing H as being Botha's dam. Then the plaintiffs are thrown back in their claim to that watercourse to that clause of the contract which reads as follows: "The owner of lot C and the owner of lot B shall each have the right to make new furrows from the large furrow described in Article 1 over one or more of the upper parts, to lead his or her water, without, however, giving up his right to the said large furrow, provided that the object indicated by the new furrow or furrows cannot be attained by the aforesaid large furrow; provided, also, that the higher owner or owners be held free from any costs incurred by the making or maintenance of the said new furrow or furrows, also from any damage that might be caused to the higher owner or owners by the running of the water in" the same. If, therefore, the plaintiffs' wish to claim a new watercourse or furrow, it is for them to indicate clearly to the defendant where the watercourse lies oris to lie, and if that new watercourse would do any damage they must give some guarantee to the defendant against the same. It struck me at the time, in considering E G H S as being a new watercourse, that there were two difficulties: first, that it is not a new watercourse, having been made by the defendant, and in the second place there is no guarantee against damage being done to the defendant. The only course upon the evidence before us is to give absolution from the instance, and costs must follow that judgment. But it was with a view to saving further litigation that the Court suggested that some arrangement should be entered into by which the plaintiffs could acquire the use of that new water-furrow, The Court will therefore indicate that the plaintiffs be given the right to use that water-furrow, but if within six weeks the pipes mentioned are not laid from H to S then that right shall cease until the pipes are laid. Six weeks are amply sufficient to lay those pipes, and possibly the plaintiffs may come to terms with the defendant for the use of cement or some other means. I may also point out in giving this judgment that the Court fairly held that Krynauw, as owner of lot A, is entitled to the use of that water, and that absolution from the instance relates only to him as owner of lot B, and as against Du Toit as owner of lot C, but I do not understand that the defendant denied the right of Krynauw as owner of lot A, but only as the owner of lot B. The only two occasions on which Krynauw was prevented from using this furrow were on February 16 and March 16, and on both of these days he was entitled to use water only for lot B without prohibition. The judgment of the Court is therefore as I have indicated, viz., absolution from the instance with costs; that the defendant consents to the furrow being used by the plaintiffs as owners of lots B and C for their ordinary water right, on condition that pipes be laid as suggested from H to S; pending such pipes being laid within six weeks from this date, the plaintiffs to use such water; but if the pipes are not laid within six weeks, then the furrow shall not be used by them until the pipes are laid.

Maasdorp, J., concurred.

[Plaintiffs' Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorney, C. C. Silberbauer.]

SUPREME COURT

[Before the Right Hon. Sir J. H. de Villiers, P.C., K.C.M.G. (Chief Justice) the Hon. Mr. Justice Buchanan, and the Hon. Mr. Justice Maasdorp.]

JOHNS v. COLONIAL GOVERNMENT.

1898.
Aug. 24th.
„ 25th,

Lessor and lessee—Cancellation of lease — Forfeiture — Non-payment of rent for two years—Mineral lease—Act 9 of 1877.

The lessee of land held under a lease for a long term of years failed to pay any rent for two years, whereupon the lessor notified to the lessee that the lease had been cancelled.

Held, *in an action brought by the lessee to have the lease declared to be of force, that the lease could only be forfeited by order of Court after due notification to the lessee that, failing payment of rent within a certain time, such an order would be applied for*

Held, further, *that the plaintiff was entitled to succeed notwithstanding the fact that, after the alleged cancellation of the lease, the lessor had executed a lease of the same land in favour of a third party.*

This was an action for a declaration of rights with regard to certain five contracts of lease and for £10,000 damages, instituted by Percy Johns against the Colonial Government. The declaration alleged that the plaintiff resides in Kimberley, and that the defendant is the Secretary for Agriculture, and is sued as representing the Colonial Government.

That on or about the 1st day of October, 1896, certain leases of mineral lands in the district of Namaqualand were granted to the plaintiff by the Colonial Government according to law. The said leases were granted more especially under and by virtue of Acts 9 of 1877, 15 of 1883, and Government Notice 46 of 1884.

The said leases were duly executed and signed by the Surveyor-General on behalf of the Colonial Government and by the plaintiff. They were each and all to last for a term of ninety-nine years, calculated from 1st October. 1896, at an annual ground-rent of 5s. per morgen, and a royalty of 6d. for every ton of coal and 10s. for every ton of any mineral other than coal raised from the land.

The following is a list of the said leases: No. 1, lease 50, lot 47, yearly rental, £2 10s.; No. 2, lease 53, lot 50, yearly rental, £9 18s. 8d.; No. 3, lease 54, lot 51, yearly rental, £6 19s. 6d.; No. 4, lease 57, lot 48, yearly rental, £2 10s.; No. 5, lease 52, lot 49, yearly rental, £7.

It was specially stipulated that the rent should in each case be payable in advance on the 1st day of October in each and every year, commencing on the 1st October, 1896, The said leases were duly registered in the office of the Surveyor-General according to law.

On or about the 5th April, 1898, the Colonial Government wrongfully and unlawfully repudiated the said leases, and notified that they had been cancelled.

On the said date no rental had been paid in respect of the said leases, but the plaintiff, on the 23rd April. 1898, duly tendered the full rental in respect of all the said leases up to the 1st October, 1898, being the sum of £57 16s. 4d. in all, which the defendant refused to accept. The plaintiff has always been, and still is, ready and willing to pay the said rental and to carry out all his obligations under the said leases.

By reason of the said wrongful and unlawful repudiation of the said leases by the Colonial Government, the plaintiff has been prevented from floating the same into a company, and has suffered damage in the sum of £10,000.

The plaintiff claims:

(*a*) An order declaring that the said leases are still of force and effect, and that the said repudiation thereof by the defendant was wrongful and illegal.

(*b*) Payment of the sum of £10,000 as damages aforesaid,

(*c*) Alternative relief and costs.

For a plea to the plaintiff's declaration, the defendant said as follows:

He admits the allegations contained in paragraphs 1, 2, 3, and 4 of the declaration.

With regard to the allegations contained in paragraph 5, he admits that on or about the 5th April, 1898, the Colonial Government cancelled the said leases referred to in paragraph 3 of the declaration, but he denies that the said cancellation was wrongful or unlawful.

He says that after the said leases were executed and signed by the plaintiff and defendant, the plaintiff failed to do any work upon the land so leased, failed to pay the stipulated rent in respect thereof, and wholly abandoned the said land.

He admits that up to April 5, 1898, no rental had been paid in respect of the said leases, and he admits the tender referred to in paragraph 6 of the declaration, and that he refused to accept the same, but save as above he denies the allegations in paragraphs 6 and 7.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

The replication was general, and on these pleadings issue was joined.

Mr. Rose-Innes, Q.C., and Mr. Currey appeared for the plaintiff.

Mr. Sheil, Q.C., and Mr. Upington for the Government.

Percy Johns, the plaintiff, stated that he was a mining agent. At various times he had acquired certain mining rights and concessions. The leases in dispute were granted on August 1, 1896, and he tried to float them into a company. In 1898, when he received notification of the cancellation of the leases, these negotiations for floating were going on in London, and were approaching completion. The flotation was on terms which were very favourable to himself, and he would have made a good profit if it had gone through. He was to get £15,000 in cash and 30,000 shares. When he received the notification he was in Johannesburg. He then communicated with his attorney, and forwarded to the Civil Commissioner of Namaqualand the sum of £57 16s. 4d., rent due on the properties. This cheque was returned, with a further intimation that the leases had been cancelled. He did not pay his rent before because he was temporarily embarrassed, and because he thought the Government would give him some intimation that the rent was due before cancellation. He had no idea of abandoning the property. During the last two years there had been a great rise in the value of copper properties.

Mr. Sheil stated in reply to the Court that the leases had now been given to others. Two of these had been granted to Mr. De Marillac, one to Mr. Warner, and two to Mr. Oats, but the last named was willing to give them up.

De Villiers, C.J.: It is a pity the Government did not delay the fresh leases until after this action.

Witness (continuing) said in 1896 copper was worth £30 a ton, but now it was worth £52.

De Villiers, C.J.: Is there copper there?

Witness: There are indications.

De Villiers, C.J.: I suppose that is, a minor matter in floating a company.

Mr. Innes: It is more a mining matter, my lord.

Cross-examined, the witness said he had never been to Namaqualand. He did not know anything about copper actually. He took out these leases as a speculation. He had no intention of working them. When he applied for these leases he knew that the mines had been previously abandoned by the Copper Company and another, but not abandoned as worthless. He knew nothing of the value of these grounds, and did not know which of the properties was most valuable. He tried to float the company because there was great demand for Namaqualand copper. Without being able to give any personal information about the mines he was offered £15,000 and 30,000 shares. When these mines were abandoned copper was very low in price. He had tried to sell these leases in Kimberley. He offered them to Mr. Oats for £1,250 for the lot. That was during the time he was negotiating in London, but it was before he had received the offer of £15,000. Mr. Oats told him that he was going to Namaqualand, and would make inquiries, but eventually refused the offer. He had also offered these leases to Dr. Rutherfoord Harris. He did not remember that when he wrote to Dr. Rutherfoord Harris he wrote of these mines in glowing terms, and referred to a large quantity of gold having been discovered.

Mr. Sheil put in this letter, dated the 31st January last, in which plaintiff said these were all well-known mines which had been worked and in which copper, and also some fine specimens of alluvial gold had been found.

Witness said he had no personal knowledge of the mines, but his information about the gold was from the man who found the alluvial. He had ceded these leases to a friend, who advanced him a certain sum of money. This money was not advanced to enable him to fight the Government in that case. He was fighting that case with his own money. He and this friend were partners in this business, and although he had ceded the leases to Mr. Smith, he still had an interest in them.

Ludovic Dominicus, secretary of the West Cape Exploration Company, and manager of the Klipkaap Copper Syndicate, said he had been in Namaqualand for many years. He knew the country where these mines were situated, but did not know the mines themselves. Four of them were near the Copper Company's mines. He could not give any information as to the value of these properties.

For the defence.

John Templer Horne, Surveyor-General of the Colony, said he had signed these leases on behalf of the Government, and also cancelled them under instructions from the Agricultural Department.

Cross-examined: He cancelled these leases on the ground that no rent had been paid and no work done. They were cancelled because the Government thought that under Act 9 of 1877 they could cancel these leases at the expiration of one year. There was a clause in the lease which said that cancellation could take place at the end of three years. He knew that no work had been done and no rent paid. It was not usual to cancel a lease without giving some notification that the rent was due, and that if unpaid the lease would be cancelled, especially with such long leases. He thought there were some new lessees who were anxious to get these leases before they were cancelled.

Francis Oats, mining engineer, said he had had a long experience in copper and tin mining. This year Johns offered these leases to him for £250 each, and he told him (Johns) that he was going to Namaqualand, and would inspect them. He would like to explain that his agent applied for these two leases without his (witness's) knowledge, and he told his agent that if the leases were granted to him he would feel compelled to pay Johns on the terms which had been previously discussed, or retire from them in Johns's favour. From his knowledge as a mining expert he thought there was a chance, by spending money, to discover a copper mine on the property, but the probabilities were that copper would not be found in payable quantities. On four of these mines considerable sums of money had been spent in endeavouring to find copper in payable quantities. He did not intend to take these two leases which the Government had offered to him if the plaintiff wanted them. He was surprised to hear that the plaintiff had had an offer of £15,000 for the leases, seeing that Johns had offered them to him for £250 each. He had never heard of a company being promoted in the manner in which the plaintiff described, although some strange things were done sometimes in company promotion.

De Villiers, C.J.: If you bought the lot what would you be prepared to give for them?

Witness: I do not think I would give anything, because there are new grounds which may be quite as good, and which can be got for nothing.

John Henwood, mine captain, said he had been in the service of the Cape Copper Company for the last thirty-three years. He had inspected these mines. At one of them some work was being done at the present time, and he estimated that 4 per cent. of copper was being mined, and they must have 20 per cent. of copper before a mine in Namaqualand could be made payable.

This closed the case for the defence.

Mr. Innes: After action brought the plaintiff applied to Government for information as to the persons to whom the leases had been given, but the information was refused. He did not abandon them; he did not work them but he was not bound to work within three years. The Government covenanted on conditions taken from Act 9 of 1877, section 10. The three years have not yet elapsed. Cancellation must be through Governor and Council; there is no evidence that the consent of the Governor was obtained. As to the non-payment of rent, it is admitted by the Surveyor-General that in no other case has a lease been cancelled without notice having been given that it would be cancelled.

[De Villiers, C.J.: If a notice had been given to the effect that cancellation would take place if the rent were not paid, it might be said that non-payment was equivalent to an abandonment.]

Even by common law the rent must be two full years in arrear before the lease is cancelled. *Voet* (19, 2, 16).

[De Villiers, C.J.: That is where rent is not payable in advance.]

There is no such distinction drawn. Even though the rent might be payable in advance, the full period of two years had not elapsed. *Grotius* (3, 19, 11); *Van Leeuwen* (Bk. 4, Chap. 21). The intention of Act 9 of 1877 was that leases should not be hastily cancelled; long leases like those in question approximate very nearly to dominium. By Ordinance 9 of 1844, where land-rent is in arrear it is the duty of the Civil Commissioner to make a demand for it.

Mr. Sheil: The leases were cancelled because the plaintiff had complied with none of their requisites and in reliance upon the common law. It is clear from Act 9 of 1877 that the Legislature intended to encourage the search for minerals; it was not intended that a lessee should sit upon his lease for years until a favourable opportunity arose for speculating with it. *Voet* (19, 2, 16) only refers to rent which is payable at the end of the year. *Van Leeuwen* (4, 21. 7) says that where periods for payment are fixed and the hirer has neglected to pay at the stipulated time the lease is determined; this must refer to the case of rent payable in advance and so does not conflict with the passage from *Voet*. The Court should be satisfied that the lessee has performed his covenants. By assigning the leases he has contravened section 9. Inasmuch as they have now been granted to others there is great objection to a decree of specific performance.

[De Villiers, C.J.: It is not a claim for specific performance but for a declaration of rights.]

Voet (19, 2, 15). If an article has been let to one person and afterwards let to another there is nothing left to the first lessee but to sue the lessor for damages.

[Maasdorp, J.: Does not that apply only to movables?]

It is not so stated.

[De Villiers, C.J.: In Roman-Dutch law a lease has always been recognised as giving a real right. It gives a preference even over a purchase; therefore, *a fortiori* it would give a preference over another lessee.

Mr. Innes: In *Voet* (19, 2, 15) there is nothing more than an extension to the lease of a movable article to the rule already laid down respecting the hire of personal services. As to no work having been done the plaintiff had three years within which to do it.

Postea (August 25th).

De Villiers, C.J.: On the 1st of October, 1896, certain leases of mineral lands were granted by the Colonial Government to the plaintiff under Act 9 of 1877, as amended by Act 15 of 1883. Each lease was for the term of ninety-nine years at an annual ground rent of 5s. per morgen, with a royalty of sixpence per ton of coal and 10s. per ton of any other mineral. The rent was made payable in advance on the 1st of October in each year. On the 5th of April, 1898, the Government notified to the plaintiff that the leases had been cancelled in the ground of non-payment of rent. No previous notification had been given to him that unless the rent was paid before a certain time the leases would be cancelled. The object of the present action is to have it declared that the leases are still in force. The plea admits the cancelling of the leases and states that this was lawfully done, inasmuch as the plaintiff had failed to do any mining work on the land or to pay the rent. It is quite clear from the correspondence that Government was at first under the impression that if at the end of the first year a quantity of ore of not less than fifty tons were raised from the land the Governor had the right, with the advice of the Executive Council, to cancel the leases and resume the land comprised in them. This right was claimed under the 10th section of the Act of 1877, but it is now admitted that the right could only arise at the expiration of the first and each succeeding term of *three years* and not at the expiration of the *first year*. The right of cancelling the leases is, however, claimed under the common law on the ground that two years' rent was in arrear.

In support of this right *Voet* (19, 2, 16) has been quoted. He enumerates among the causes for which a lessee may be ejected before the expiration of his term, the delay in payment of rent for the full period of two years. But the point is whether a lessee may be ejected or the lease cancelled without some prior notification to him that ejectment or cancellation would be claimed unless the arrear rent be paid within a certain time. *Ulrich Huber* in his *Hedendaagsche Rechtsgeleerdheid* (3, 9, 1 and 2), lays it down that "a landlord who desires to claim a forfeiture of the lease for non payment of rent for two years, must follow the ordinary course of law, and is therefore bound to give notice of his claim. This," adds the author, "he may do before the expiration of the second year, notice being given of the condition, that if the rent be not paid within the two years forfeiture will be claimed." I take it then that just as a lessee cannot be ejected without the judgment of a Court, so a duly executed lease cannot be declared cancelled without a judgment, and that in neither case can advantage be taken of the non-payment of rent for two years without giving the lessee an opportunity of paying the rent and thus preventing the forfeiture. In the present case there has been neither a notification that the leases would be cancelled unless the arrear rent was paid nor has there been any judgment cancelling the lease. There has not even been an order of the Governor, with the advice of the Executive Council, for the cancellation of the lease, such as would have been necessary if the cancellation had taken place under the 10th section of the Act. It has been objected, however, to the plaintiff's claim to have the leases declared to be of force, that some of the land comprised in them has been leased to others by virtue of subsequent leases. This fact cannot, in my opinion, stand in the way of the plaintiff's claim. It has been more than once explained in this Court that under our law a lease of land is not in every respect such a purely personal contract as it was under the Roman law. If "hiring goes before sale," *a fortiori* would "hiring go before subsequent hiring." The first lessee of land has a sufficient real interest in the land to entitle him to protection against a subsequent lease of the same land executed without his knowledge or consent. The plaintiff is entitled, therefore, to the declaration asked for with costs. No damages have been proved and none will be awarded.

[Plaintiff's Attorney, Mr. Gus. Trollip; Defendant's Attorneys, Messrs. J. & H. Reid & Nephew.]

TORVA EXPLORING SYNDICATE v. FOLEY. { 1898. Aug. 24th.

This was an appeal from the High Court of Rhodesia. It was in all respects similar to the appeal cases of *Torva Exploring Syndicate v. Kelly, Mocks and Lamb, N.O.* (supra, p. 159) already decided.

Mr. Schreiner, Q C., appeared for the appellants but did not offer any argument.

De Villiers, C.J.: It is quite clear that there are no fresh facts in this case and the Court will therefore dismiss the appeal.

QUEEN v. FITZGERALD. { 1898. Aug. 24th.

Forgery—Cheque—Intent to defraud.

The false indorsement in the name of the payee of a cheque payable to his order does not constitute forgery if done without intent to defraud.

This was a matter which came up on review from the Acting Resident Magistrate of Cape Town and was argued at the request of the Court.

The prisoner James Collins Fitzgerald was charged before the Acting Resident Magistrate of Cape Town on three counts, viz., the theft, the forgery, and the uttering of a cheque drawn on the Standard Bank by one J. A. Smit, and made payable to Mr. F. Karie or order. He was found not guilty of theft, but guilty of forgery and uttering, and sentenced to six weeks' imprisonment with hard labour.

The evidence upon which he was found guilty was as follows: On the 16th July Smit wrote a letter to Mrs. Fitzgerald, enclosed it in an envelope, and addressed it to her. He also drew the cheque in question for £1 in favour of one F. Karie, and also enclosed this in an envelope, and addressed it to Mr. Karie. He placed both envelopes in his bag. Later in the day he met prisoner at the Branch Market, and knowing that he lived in the same house as Mrs. Fitzgerald, though not related to her, he gave him the envelope which he thought was the one addressed to Mrs. Fitzgerald. What he did give prisoner, however, was the envelope addressed to Karie, and containing the cheque. The prisoner took the envelope to Mrs. Fitzgerald, and she opened it and asked him to cash the cheque. He took it to the Standard Bank and endorsed it "F. Karie." In reply to the bank teller, he said he was Mr. Karie. The teller thereupon paid the cheque, and the prisoner took the proceeds to Mrs. Fitzgerald. Smit discovered his mistake shortly after it occurred, but did not discover until Monday, the 18th, that the cheque had been cashed. He then gave information to the police, and prisoner was arrested. When cautioned, he said: "Yes, I don't deny I wrote that name on the cheque. I did not know there was any harm: it is only for £1." Smit in his evidence said he allowed Mrs. Fitzgerald £1 a week as a friend, she being in poor circumstances and bad health, and that the prisoner had been in the habit of getting cheques from him for Mrs. Fitzgerald. Mrs. Fitzgerald had reason to expect a cheque for £1, and he said that the cheque which should have come to her he had repaid to Mr. Karie, so that neither himself nor Mr. Karie had been defrauded. In cross-examination he admitted that he had once addressed Mrs. Fitzgerald as "Mrs. Smit."

Mrs. Fitzgerald gave the following evidence: The prisoner was in the habit of getting cheques for me weekly from last witness for some considerable time past. The cheques were made payable to me or bearer. I never endorsed them. Prisoner used to cash them for me and bring me the money. On Saturday, the 16th instant, prisoner brought me a letter addressed to Mr. Karie. He told me Mr. Smit sent it. I opened the envelope, and found the cheque produced in it payable to Mr. Karie. I asked prisoner to go to the bank and cash it. I thought the cheque was for myself, as I had on previous occasions received cheques from Mr. Smit made out in favour of other people or bearer. I thought he intended it as a joke. I honestly believed the cheque was meant for me. The prisoner cashed and brought me the money. He had no benefit from the transaction.

By the Court: I did not ask prisoner to endorse the cheque. I did not notice it had to be endorsed.

The prisoner was sworn, and said that when Mrs. Fitzgerald asked him to cash the cheque he was not aware it was payable to Mr. Karie. When he got to the bank he saw it was payable to Karie, and so endorsed it F. Karie. He did not know what Karie was meant, and had no intention to defraud.

Mr. Jones appeared for the prisoner, Mr. Sheil, Q.C., for the Crown.

Mr. Jones: Forgery is a branch of the crime of *falsum* and the two essentials of *falsum* are (1) actual prejudice to some other person and (2) criminal intention. *Regina* v. *Brandford* (7 Juta, p. 170) at p. 173; *Regina* v. *Poley* (1878, p. 49). There no one was prejudiced; the same amount was due both to Karie and to Mrs. Fitzgerald: Mrs. Fitzgerald has received the proper amount and Karie has been paid the money which should have been paid to Mrs. Fitzgerald.

[De Villiers, C.J.: Was there no prejudice to the bank?]

No actual prejudice, though there may have been a potential prejudice: the cheque was paid out of the drawer's funds and he has raised no objection.

[De Villiers, C.J.: If the drawer of a cheque discovers a forgery and does not object the Bank is nevertheless prejudiced, otherwise in every case where the drawer does not object forgery is not committed.]

Actual prejudice must mean that some one has suffered injury or loss; here the bank is not a penny the poorer on account of the prisoner's act. Moreover, there was no criminal intent, that is shown by the fact that the prisoner was acquitted of theft. Mrs. Fitzgerald honestly believed that the cheque was meant for her and if she had endorsed the name "F. Karie" upon it believing it was a pseudonym given her by Smit she would not have committed a crime: prisoner acted under her authority, and if she would be guiltless he would be equally so.

Mr. Sheil: The two essentials of forgery are stated in *Regina* v. *Wilson* (2 App. Cap., 1) to be (1) falsely making a written instrument, (2) intention to defraud. The Magistrate has found as a fact that the criminal intent existed and he is supported by the evidence, especially the evidence of the teller of the bank.

[Buchanan, J.: If the accused had no right to endorse the cheque it was the property of Karie and, therefore, he was guilty of theft. But the Magistrate acquitted him.]

The acquittal on the charge of theft does not affect the charge of forgery.

[Buchanan, J.: It affects the question of criminal intent.]

The absence of prejudice to another person is no ground for an acquittal. In the English cases it has been held that conviction may follow even if the cheque is not paid. I can find no English case in point except where the course of dealing between the accused and the person whose name is forged gives reasonable grounds for accused believing that he had authority to sign. There is no evidence of any dealing between Karie and accused. *Regina* v. *Nash* (2 Den 499); *Regina* v. *Cooke* (8 C and P., 582); *Regina* v. *Hill* (8 C. and P., 274); *Regina* v. *Beard* (8 C. and P., 148); *Regina* v. *Wardell* (3 F. and F., 82).

The conviction was quashed.

De Villiers, C.J.: The facts of the case are very peculiar. Smit, the drawer of the cheque in question, was in the habit of supplying Mrs. Fitzgerald with one pound weekly. On the 16th of July he wrote two letters, one of them being addressed to Mrs. Fitzgerald and the other to F. Karie. Enclosed in the letter was a cheque for £1 drawn by Smit on Karie or order. Smit, meeting the prisoner at the market, gave him the letter addressed to Karie and asked him to deliver it to Mrs. Fitzgerald. It appears that Smit had on previous occasions addressed her by an assumed name, and she accordingly opened the letter, and, believing that the cheque was intended for her, she gave it to the prisoner to change for her at the bank on which it was drawn. At the bank he was asked whether he was Mr. Karie and he answered "Yes," upon which he endorsed the cheque in the name of F. Karie and received a sovereign from the teller which he gave to Mrs. Fitzgerald. For thus falsely endorsing the name of F. Karie the prisoner was charged with forgery and convicted by the Resident Magistrate of Cape Town. Undoubtedly the prisoner acted very improperly in telling the falsehood at the bank and endorsing Karie's name on the cheque, but unless he did so with intent to defraud, he could not be legally convicted of forgery. In my opinion, the facts clearly show that, however wrong his conduct was, he had no intent to defraud any one. He had been asked by Smit to deliver the letter enclosing the cheque to Mrs. Fitzgerald, and appears to have shared her belief that the cheque was make payable to the order of Karie by way of joke. He had no personal interest in the matter, and, not knowing that there was a real person of the name of F. Karie, he wrote that name on the back of the cheque in order to carry out the assumed intention of the drawer, and pay the proceeds to the person for whom he believed they were intended. Under these circumstances the prisoner was wrongly convicted, and the appeal must be allowed accordingly.

Buchanan and Maasdorp, J.J., concurred.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

EGENEAS V. DYER.

1898. Aug. 25th.

Mr. Upington applied for provisional sentence for the sum of £250, less £50 paid on account on a mortgage bond.—Granted.

D. G. ROSSOUW'S ESTATE V. G. W. REITZ.

Mr. Ashburnham asked for provisional sentence on a promissory note for £25.—Granted.

ARDERNE AND CO. V. HARRIES.

Mr. Ashburnham applied for judgment under Rule 329 for £105 6s. 5d., together with interest, and also for provisional sentence on a promissory note for £100. A consent paper has been filed.—Granted.

CLEGHORN AND HARRIS V. WM. GRASS.

Mr. Close applied for confirmation of a writ of arrest granted by the Chief Justice on the 17th August last. Defendant was arrested for a debt of £46 for goods supplied. —Defendant appeared and admitted the debt.—Judgment was given against him, and he was released from arrest.

HEPWORTHS LIMITED V. BEVERN.

Mr. Currey applied for judgment, under Rule 329, for £12 6s. 6d. for goods sold.—Granted.

CELLIERS V. MYBURGH.

Mr. Benjamin asked for judgment under Rule 329, for an account of the disposal of twenty-one mules sold by the defendant on behalf of the plaintiff.—Granted, the account to be rendered within a fortnight.

JAGGER AND CO. V. TREURNICH.

Mr. Upington asked for judgment, under Rule 329, for £54 4s. 1d., balance of account or goods sold and delivered.—Granted.

MCGREGOR V. THE DIVISIONAL COUNCIL OF CLANWILLIAM.

This was an application by the defendant for postponement of trial.

Mr. Innes, Q.C., appeared for the applicant, and Mr. Schreiner for the respondent.

De Villiers. C.J.. said there was no chance of hearing the case this term, and it had better stand over.

The case was therefore postponed until the 7th November, the costs of the application also to stand over.

SWART V. SWART AND HAUPTFLEISCH.

This was an application on behalf of the defendant Hauptfleisch : (1) For leave to purge default; (2) for an order on plaintiff to provide security for costs, on the ground that he was not resident in the Colony ; for removal of trial to the Circuit Court of Swellendam.

For the respondent, it was alleged that he was now residing at the Paarl, although the declaration alleged him to be residing in the Free State.

Mr. Schreiner, Q.C., appeared for the applicant.

Mr. McGregor for the respondent.

After argument,

De Villiers, C.J.: The Court will remove the bar. There will be no order as to the security for costs, and the Court will order the removal of the case to Swellendam, the costs to be costs in the cause.

DE KOCK V. LE ROUX.

1898.
Aug. 25th.
„ 26th.
„ 27th.

Riparian proprietors—Water rights—Reasonable share—Irrigation—Will.

Independently of prescription the right of a riparian owner to use water in a perennial stream for mechanical purposes is subject to the prior right of other riparian owners to the reasonable use of the water for agricultural purposes.

This was an action for declaration of water rights, brought by Johannes de Kock, a farmer, of Caledon, against Mrs. Le Roux, who occupied a neighbouring farm.

The plaintiff's declaration was in the following terms:

1. The plaintiff is, and has been since July 18, 1863, the registered owner of the farm Roodeheuvel, in the division of Caledon.

2. The defendant is a widow, and has been since February 27, 1895, the registered owner of the adjoining farm, Compagniesdrift, in the same division, which was theretofore for many years the property of the defendant's late husband, Gabriel Stephanus Petrus le Roux.

3. Across the defendant's said farm there run, and thereon meet, two perennial public streams known as the Bot River and the Houw Hoek River, and below the point of junction the united stream continues, under the name of the Bot River, to flow across the said farm, and thence on to and across the adjoining farm Roodeheuvel aforesaid, the plaintiff's property, upon which farm the stream is joined by another perennial public stream known as the Dams River, which rises on Crown land and flows thence across the defendant's said farm on to and across the plaintiff's said farm into the said Bot River below the said point of junction.

4. Independently of the special rights in respect of the water coming from the Houw Hoek River and Bot River, as set forth in paragraphs 5, 6, and 7, the plaintiff is, as riparian proprietor, entitled to a reasonable share of the water of each of the said streams for domestic use, for watering of his stock, and for irrigation of his fruit orchards, gardens, and sowing lands, and he is also entitled to the use of the water of the said streams to work a certain mill upon his farm, which he and his predecessors have there had and used for grinding grain for himself or themselves and customers for a period far exceeding thirty years.

5. For a period far exceeding thirty years, and during the dry season in each year, the water flowing in the Houw Hoek River has been and still is diverted from the said stream at a point upon the defendant's said farm by a furrow, which conducts the said water, after irrigating the defendant's sowing lands and gardens near her "opstal," or residence, over a mill of the defendant, from which the said water has, during the said period, and until the grievances hereinafter complained of, flowed down into the Bot River below the aforesaid point of junction, and down the said stream to the plaintiff's farm for his use.

6. More than thirty years ago, to wit, in January, 1866, the plaintiff claimed and asserted himself as of right, and adversely to the predecessor in title of the defendant, to be entitled to the free flow for his use of

the water so diverted from the Houw Hoek River, as mentioned in the last preceding paragraph, below the mill on defendant's farm, and the predecessors in title of the defendant then and thereafter admitted that the plaintiff was so entitled, and the plaintiff, for thirty years and upwards, enjoyed and had the free flow of the said water for his use below the said mill, and has a prescriptive right thereto against the defendant as owner of said farm Compagniesdrift.

7. During a period far exceeding thirty years, the plaintiff and his predecessors in title have as of right, and adversely to the defendant and her predecessors in title, diverted water from the Bot River at a point in its course over the farm Compagniesdrift, below the said point of junction, by a furrow taking the said water on to the plaintiff's farm for domestic use, for watering his stock, and for irrigating his fruit orchards, gardens, and sowing lands, and the plaintiff has a prescriptive right so to take such water as he is entitled to at such point and by means of such furrow, or to receive the same by means of the channel of the said river at such times as he may not desire to divert the same at the point aforesaid.

8. Before the grievances hereinafter complained of, and for a period exceeding thirty years, and during the winter months in each year, when the said stream, Dams River, has been flowing in force, the plaintiff has lawfully and of right used the water flowing in the said stream on to his farm from the said farm of the defendant to work his (the plaintiff's) aforesaid mill, and is lawfully entitled to continue so to use the said water.

9. During the dry seasons of the years 1896, 1897, and 1898, to wit, in the months of November and December in the year 1896, January, February, November, and December, 1897, and January and February, 1898, the defendant and her bywoners or servants wrongfully and unlawfully diverted and used upon the farm Compagniesdrift an unreasonable share of the water of the two first-mentioned streams, and more especially the defendant wrongfully and unlawfully diverted and used all the water taken out of the Houw Hoek River, as set forth in paragraph 5, and wrongfully and unlawfully prevented the same from freely flowing down after passing over her mill to the channel of the Bot River, below the point of junction of the said two streams, for the use of the plaintiff as aforesaid, whereby during the said seasons the defendant wrongfully and unlawfully both deprived the plaintiff of his reasonable share of the water of the said streams, and prevented him from using and enjoying his prescriptive rights set forth in paragraphs 6 and 7 of this declaration.

10. During the winter or the wet seasons of the years 1896 and 1897 the defendant unreasonably, wrongfully, and unlawfully so diverted the water of the Dams River aforesaid as to prevent the same from flowing as theretofore it had flowed, as described in paragraph 8, on to the farm of the plaintiff for his use in working his said mill.

11. By reason of the wrongful and unlawful acts of the defendant in paragraph 9 set forth, the plaintiff was deprived of water for domestic purposes, for watering his stock, for irrigating his fruit orchards, gardens, and sowing lands, and for working his mill, and by reason of the wrongful and unlawful acts of the defendant in paragraph 10 set forth, the plaintiff was deprived of a reasonable share of water for working his mill during the winter months, and lost much custom thereby.

12. The plaintiff has sustained damages in respect of the said wrongful and unlawful acts of the defendant in the sum of £200 sterling.

13. The plaintiff is entitled to a declaration of his rights in the premises as against the defendant, to an interdict restraining the defendant from interfering with his rights as declared, and to damages in the sum of £200 sterling.

Wherefore the plaintiff prays for:

(*a*) A declaration that he is by prescription entitled during the dry season of each year to the free flow for his use of the water diverted from the Houw Hoek River in manner set forth in paragraph 5, after the said water has been used by the defendant as set forth in that paragraph, and has passed the defendant's mill.

(*b*) A declaration that he is by prescription entitled to take such water as he is entitled to out of the two said streams at a point in the course of Bot River below the point of the junction of the two streams, the Bot River and the Houw Hoek River, and by the accustomed furrow across the defendant's said farm, at all times when he (the plaintiff) shall desire so to divert the said water out of the channel of the Bot River, and at such point.

(*c*) A declaration that he is at all times, as a riparian proprietor, entitled to a reasonable share of the water of the Bot River and

Houw Hoek River and Dams River, independently of the special rights founded upon prescription as aforesaid.

(*d*) An interdict restraining the defendant from interfering with any of the rights of the plaintiff as so declared, and from unreasonably diverting the water of the Dams River during the winter months to the detriment of plaintiff.

(*e*) Judgment for the sum of £200, as and for damages so sustained as aforesaid.

(*f*) Other relief.

(*g*) Costs of suit.

The defendant filed the following plea :

1. She admits the allegations in the first two paragraphs of the declaration.

2. As to the third paragraph, she says that the Dams River is not a perennial stream ; it generally contains a small flow of water during the winter months, but is completely dry during the remainder of the year. Save as above, she admits the other allegations in the third paragraph.

3. As to the fourth paragraph, she refers this Honourable Court to the allegations hereinafter in the fourth paragraph of this plea contained. Subject to the said allegations, she denies the statements in the said fourth paragraph.

4. With regard to the fifth and sixth paragraphs, she says : (*a*) For a period of more than thirty years the defendant and her predecessors in title have, during the dry season, diverted the water in the Houw Hoek River, as in the fifth paragraph set forth. (*b*) The water so diverted has during the said period been used as of right by her and by her predecessors in title for the purposes of irrigation, not only above the mill in the fifth paragraph referred to, but also below the said mill. (*c*) The defendant and her predecessors in title have, during the said period, claimed and exercised the right to the use of the whole of the said water so diverted. Any soakage water or surplus water not required by them from time to time has been allowed to run or to find its way into the channel of the Bot River. But the plaintiff and his predecessors have at no time claimed or asserted an adverse right to the free flow into the Bot River below the mill of the water so diverted, as aforesaid. (*d*) During the said period the plaintiff and his predecessors have depended for their water supply upon the water coming down in the main channel of the Bot River ; and the defendant and her predecessors have claimed and asserted the sole right to and control over the water diverted from the channel of the Houw Hoek River in manner heretofore referred to. (*e*) The defendant and her predecessors in title have not during the said period used any of the water in the main channel of the Bot River, nor do they claim any right to such water. But they have used and have acquired a prescriptive right to the use of the water in certain small rivulets which are not perennial, but which if not used by the defendant would occasionally discharge a small quantity of water into the Bot River. The said rivulets are not referred to specially in the declaration. (*f*) The defendant is entitled to continue the use of water hereinbefore described ; and she says that all the water so used by herself and her predecessors does not amount to more than a reasonable share of the total amount of water available for the use of the two farms from the Houw Hoek and the Bot Rivers. Subject to the above, she denies the allegations in the fifth and sixth paragraphs.

5. She admits the allegations in the seventh paragraph ; but as to the water which the plaintiff is entitled to divert and convey by means of the furrow therein mentioned, she refers this Honourable Court to the allegations in the preceding paragraph of this plea.

6. As to the eighth paragraph, she says that she is unable to gather from the language of the said paragraph, whether the plaintiff claims a right to the sole use of the water in the Dams River, or only to the use of so much water as may from time to time flow on to his farm from the farm of the defendant. But she refers this Honourable Court to the allegations in the second paragraph of this plea, and she denies that the plaintiff has, by prescription or otherwise, acquired the sole right to the use of such water as may during the winter months flow in the said stream.

7. She denies the allegations in the ninth paragraph, save that she says that during the said period any water taken and used by her was so taken in accordance with the use in paragraph 4 of this plea referred to.

8. She denies the allegations in the tenth, eleventh, twelfth, and thirteenth paragraphs.

Wherefore she prays that the plaintiff's claim may be dismissed, with costs.

The replication was general.

Mr. Schreiner, Q.C. (with him Mr. Currey) appeared for the plaintiff.

Mr. Innes, Q.C. (with him Mr. McGregor) for the defendant.

Mr. Schreiner applied for an amendment of the sixth paragraph of the declaration by the insertion of the word " theretofore " before the words " then and thereafter."

Mr. Innes said he left the matter in the hands of the Court.

The amendment was allowed.

Charles Christian de Villiers said he had visited the place in dispute, and the plans put in had been prepared according to his instructions. The plaintiff's trees were far healthier trees than those of the defendant. The plaintiff's were very much older, and there was no indication that they had been watered before he visited the farms in April last year.

Peter Johannes de Kock, the plaintiff, owner of the farm Roodeheuvel, said he bought this property in 1862 from his uncle, together with all the water-rights. Since Jacobus le Roux came to the district he had diverted the stream to some sandy land which was covered with grass, but he (plaintiff) raised a protest and got his attorney to write a letter to le Roux. (Copy put in). Plaintiff gave the letter to le Roux, who asked if he suffered £500 damages; plaintiff said not if the water was allowed to run as formerly; if not then he would inform his attorney at once. Le Roux then went with him and allowed the water to run down; after that he did not again intercept the water. Jacobus le Roux was succeeded on the farm by Gabriel le Roux, the late husband of the present defendant. It was during that time that the defendant's oak plantations was started, but his (plaintiff's) had been in existence for some years. At the request of Le Roux, he (plaintiff) allowed him to use his water for the first year in order to allow the young trees to take root. During the lifetime of Le Roux there was no further trouble about the water. After his death more water was used on Le Roux's farm. During the last three years, during the dry season, no water had come down to his farm from that furrow. It was all turned into Le Roux's oak plantation. For the last two or three years he had scarcely had enough water for domestic purposes, but previous to that he had had an abundance of water. In late years his vineyard had suffered severely from want of water. His farm was in an infected area, but he denied that he had phylloxera on his farm. Mrs. Le Roux diverted the water higher up than his farm. He spoke to her in 1896, and told her that her trees were being overgrown. Mrs. Le Roux was his niece, and the two families had intermarried. He was not anxious to go to law with Mrs. Le Roux. He regarded it as his right that the water should flow freely below the mill. He had lost a great many customers because he could not get sufficient water to work his mill. He had lost more than £200 during the last two or three years in consequence of the water being diverted. During the last year or two he had not cultivated his garden.

Cross-examined: He had started a new garden during the last two or three years, and this had done pretty well. During the last two years the water had continually been diverted from his land to the defendant's oak plantation. He used to irrigate his vineyard, but he had not been able to do this during the last two summers as there was no water.

Paul Vyfer, a former overseer on the farm of last witness, corroborated, and said that up to the last two or three years water on the farm was quite plentiful.

Cross-examined: He had seen the river stagnant, but not very often. It was dry only in a very season dry.

Philip Rudolph Geldenhuys said he was seventy-three years of age. He resided two hours from De Kock's farm. He knew the farm Roodeheuvel, and corroborated the evidence given by the previous witnesses.

Rynhard Vyfer, of Caledon, stated that he had frequently taken corn to the plaintiff's mill, but he could not get it ground because of the scarcity of water. A few years ago there was plenty of water both for the mill and the farm.

David Stephanus de Kock, son of the plaintiff, said his father had lost a good deal of money, because he had not been able to work the mill. During the last two years there had not been sufficient water for domestic purposes, but before that time there was always sufficient.

Henry de Kock, brother of the last witness, said he had lived all his life on the farm. He corroborated the evidence given by last witness.

Carel Jacobus Roux, proprietor of the farm Goedvertrouw, adjoining Compagniesdrift, owned by the defendant, said the water of the Bot River was taken out by the bywoners who lived on the slope of the mountain, and consequently it was only fit for the cattle when it came lower down.

For the defendant,

Christian Joel Krige, an attorney, said he had been over the farms in dispute, and had prepared the plan put in. This plan practically agreed with the one handed in on behalf of the plaintiff.

Jacobus le Roux, a trader, living at Worcester, said that from 1865 to 1876 he owned the farm Compagniesdrift. He described the streams and the manner in which they flowed over the farms. He gave evidence as to his user of the Houw Hoek River water. He used it as of right and as much as he pleased. He was often asked to send water down to the lower mill by plaintiff's son and men in his employ. He sometimes allowed it to run, sometimes not. In 1866 plaintiff brought him the letter referred to. He said plaintiff could do as he pleased. Witness did not at once open the furrow and let the water run down. After that he made no difference in the way he used the water. Plaintiff's son had asked for water both before and after the letter. He asked as a favour.

Willem Christoffel Esterhuysen, formerly manager of the farm Compagniesdrift, gave evidence with regard to the flow of the streams. He was present in 1866 when the letter was read by Le Roux. He corroborased his evidence respecting this letter and his action thereupon.

Gabriel Petrus Geldenhuys said he was seventy-five years of age, and had known Compagniesdrift from the time he was ten years of age. He often went there, as his wife lived there. When he went to the farm first there was no mill there. He recollected its being built, but could not give the date.

In cross-examination : When he visited the farm he did not inquire into the rights of water leading.

Daniel Nigrini said he was seventy-four years of age, and had lived all his life in the neighbourhood of the Bot River. He knew the farm Compagniesdrift. When he went there there was not a river, but there was one now, and a furrow carried the water down. He could not tell when that furrow was made, but it was before the abolition of slavery. When that furrow was made, it led water to a garden near the bridge.

Jan Barends Blom said he was miller at Compagniesdrift for fourteen years, and left three years ago. There had been water below the mill during the whole of the time he was there.

Pieter Willem Groenewald, landowner, of Caledon, said he hired a portion of Compagniesdrift, namely, the mill and the gardens, in 1868, and used as much water as he required from below the mill. He never asked permission from De Kock. On the contrary, De Kock had asked him, as a favour, to allow him to take water for his mill, and to this he consented, provided that he did not require it.

In reply to the Chief Justice, witness said that in 1868-9 there was not sufficient water in the river to drive the plaintiff's mill, but that was a very dry year.

Pieter Paul le Roux, living at Klipdrift, on the Bot River, adjoining the defendant's farm, said all his life he had lived in the neighbourhood, and he was fifty years of age. He had known Compagniesdrift farm for many years. When he knew the farm first there were no oak plantations, but there were gardens, which were watered from the Houw Hoek River.

Nicolas van As said he was seventy-one years of age, and lived on a piece of church property close to Compagniesdrift. He knew the district well. The upper mill was built first. Before the mill was built there were gardens where there was now the oak plantation. These gardens were irrigated by the water which flowed below the mill. This had been the case during all the years he could remember.

Hendrick Jacobus Beukes said he was formerly in the employ of De Kock as miller, and left in May last. During the summer in 1896 the mill had not to stop for want of water, but during last summer the mill had to stop in December and January for want of water. During that time there was water for the gardens.

In cross-examination : He was paid on commission, and as the water was not sufficient to drive the mill he complained about it. In the summer of 1896 the mill worked very slowly in consequence of the scarcity of water. It took four hours to grind a muid.

Servaas Daniel le Roux, son of defendant and son-in-law of plaintiff, said he left his mother's farm about twelve years ago, and went to a farm about an hour's drive away. Up to twelve years ago he assisted his father in managing the farm. They led water into the oak plantation, after it had passed the mill. He never asked the permission of Mr. De Kock to use this water. They had taken this water in this way as long as he could remember the farm. During the last two years he had frequently visited the farm Roodeheuval. Mr. De Kock's plants and trees looked nice, and did not appear to be suffering from want of water.

In cross-examination : Things were a bit strained in the family just at present. He had frequently visited the plaintiff's farm, but he would not say the old man was telling an untruth when he said his trees had suffered damage in consequence of the scarcity of water. He believed the old man was mistaken. Mr. De Kock's mill could never grind during the dry season. Mr. De Kock frequently asked his (witness's) father for water to enable him to run his mill.

Jacobus Petrus C. Roux, brother to last witness, said he lived close to his mother's farm. He was the son of the defendant, and he also married a daughter of the plaintiff. He corroborated the evidence of the last witness. During the last two years the plaintiff had made a new garden, and the crops were the best he ever had.

Josias le Roux, another son of the defendant, also corroborated. They had always used the water below the mill as their own property. The last two seasons had been dry, and there had been a falling off in the oak plantation because of the drought. His mother's mill had not been stopped during the last two seasons, but it sometimes ran slowly because of the scarcity of water.

In cross-examination: They had refused to grind plaintiff's wheat because things were strained in the family. Plaintiff's mill could not grind last year.

This closed the evidence.

De Villiers, C.J., however, recalled the plaintiff, who said that previous to two years ago his mill had never been stopped for want of water.

Postea (August 27th.)

De Villiers, C.J. said: It will simplify the argument very much if I tell counsel what is the impression of the Court on the case; that is that there is not sufficient proof of prescription on either side; of course this opinion is subject to argument. There is, however, evidence of an unreasonable use of the water. The impression of the Court is that no water should be taken out of the river below the upper mill. If the plaintiff choses to take it from the upper mill, let him do so, but he will suffer equally with the lower proprietor by the loss of water for the mill. If that is the view taken there would be some damages as to him, and those damages would probably carry costs. If Mr. Schreiner does not press the question of prescription the Court need not hear Mr. Innes on the point.

Mr. Schreiner, Q.C., for the plaintiff, said he would leave the matter to the Court.

De Villiers, C.J., addressing Mr. Innes, Q.C., for the defendant, said the question was what was a reasonable use of the water. The upper proprietor must use such a quantity of water as shall be reasonable having regard to the season.

Mr. Innes: There are two old furrows on the farm and these show that for a time longer than the period of prescription water has been led to one farm by one furrow and to the other farm by the other furrow. For longer than thirty years the defendant has diverted all the water from the Houw Hoek River.

[De Villiers, C.J.: The letter of 1866 shows that right was not recognized by the plaintiff.]

The meaning of the fifth paragraph of the declaration must be that all the water was taken out. Blom's evidence supports this. If I cannot show that all the water was taken out this case will come under the ruling in *van Schalkwijk* v. *Hauman* (7 Sheil, p. 195.) When a proprietor for thirty years goes upon land as of right and turns the water out there is *primâ facie* proof of his right.

If the plaintiff had a good claim in 1866, why was not action brought? There are many letters of demand written without the writers having any intention of taking further proceedings. There is great conflict between the witnesses for the plaintiff and those for the defendant. If the Court is against the defendant upon the issue of prescription, then the question of reasonable user arises. No doubt originally there was more water in both the rivers, and there was an understanding that one farm should get its water from the Houw Hoek River, and the other from the Bot River. It is impossible to believe that the Bot River is dry now, and there is evidence that the amount of water in the fountain is about half of that in the Houw Hoek River. It is a question whether the amount acquired from the fountain is not sufficient to make up what is lost from the Houw Hoek River. The weight of evidence is against the view that the defendant has deprived the plaintiff of water for domestic purposes. Plaintiff has only used it for agricultural purposes and defendant has had enough for agricultural purposes. As to the use of water for mechanical appliances *Retief* v. *Louw* (1874 p. 165, and judgment of Bell, C.J. at p. 181); *Angell on Waterworks* (section 121).

De Villiers, C.J. [after stating the facts]: The defendant by her plea, claimed the right by prescription to use all the water after it had passed over her mill for agricultural purposes. That claim is wholly untenable. The water may have been so used at times, but the plaintiff never consented to it, and on one occasion, at all events, he threatened the upper proprietor with an action if the diversion below the upper mill were continued. From that time till last year the plaintiff had sufficient water for purposes of irrigation as well as for turning the wheel of his own mill. Last year, however, the plaintiff found that the water coming down was insufficient for these purposes. At the same time he found that the defendant had sufficient water not only for her mill but to irrigate her lands below the mill. The season was a dry one, and the quantity reaching her mill was perhaps not as great as in previous years, but that would be a reason for limiting and not for increasing the irrigation on the upper farm. The reasonable user of water for irrigation should be regulated between riparian proprietors according to the season. The upper proprietor cannot claim the right in a dry season to use the same quantity of water which he has used in favourable seasons if he thus deprives the lower proprietor of his proportionate share. Then as to the plaintiff's mill I quite agree that independently of prescription the right of a riparian proprietor to use water in a perennial stream for mechanical purposes is subject to the prior right of other riparian proprietors to the reasonable use of the water for agricultural purposes. *Retief* v. *Louw*, (Buch., 1874, p. 181.) But I am satisfied from the evidence that there is sufficient water in the stream to supply the wants of the plaintiff and defendant for agricultural as well as mechanical purposes. With a judicious and reasonable use of the water, the defendant could irrigate her lands and work her mill and still leave a sufficient quantity of water for the plaintiff for the like purposes. She might irrigate more land above the mill than she irrigates at present, but that would prevent her from continously working her mill, and she therefore prefers to irrigate her land below the mill so that she may have the full measure of water for mechanical as well as for irrigating purposes. But she forgets that the plaintiff has a mill lower down, which is almost as ancient as hers, and that he has a right to a reasonable share of the water for mechanical purposes, after the reasonable requirements of both for agricultural purposes have been satisfied. The best security against her using more water than she is entitled to, would consist in her not irrigating any lands below the mill with water which has already passed the mill. If she wishes to irrigate these lands let her take out the water above the mill. In my opinion the defendant has used more than her reasonable share, and the plaintiff is entitled to damages in the sum of £25, with costs.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

JANSON V. JANSON.

1898.
Aug. 26th.

This was an action for divorce instituted by Isaac John Janson against his wife, Dorothea Janson, on the ground of her adultery.

Mr. Benjamin appeared for the plaintiff. There was no appearance for the defendant.

Isaac John Janson said he was married to the defendant at Cape Town in 1886. He lived with his wife for two years only, for in 1888 she packed up all her things and went away. He had never lived with her since, and had only seen her once since, in 1889. Three days before his wife left him they had a trifling quarrel about some comfyts which she had given away. At that time he did not suspect his wife.

Charles Karstens said the defendant was now living in one of the railway cottages at Wynberg with a man named Martin. The defendant always went by the name of Martin.

Elsie Appelbags said that in 1893 the defendant lived next door, and in that year she had a child.

The decree was granted.

[Plaintiff's Attorney, Mr. G. Ayliff.]

LAWRENCE V. LAWRENCE.

This was an action for divorce brought by Sarah Lawrence against her husband, Isaac Lawrence, on the ground of his adultery.

Mr. Gardiner appeared for the plaintiff, and said the parties were married in Cape Town in 1891, and there was one child of the marriage. In 1894 the defendant was committed for the crime of rape.

De Villiers, C.J.: Is the defendant in Court?

Mr. Gardiner: No, my lord, he is in prison at Kimberley, serving his sentence for that offence.

Sarah Lawrence, the plaintiff, said she was married to the defendant in 1891. She had no property when she was married. Her husband was now in gaol, and she was present in the Court in 1894 when he was convicted for rape. They were living together at the time her husband was arrested.

The record of the Supreme Court was put in, showing that the defendant was convicted of rape in 1894, and sent to gaol for fifteen years with thirty lashes.

De Villiers, C.J., said that was *prima facie* evidence, and the decree was granted, the plaintiff to have the custody of the child.

[Plaintiff's Attorney, Mr. C. M. de Korte.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice) the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

REGINA V. NEL.

Mr. Jones, on behalf of Christian Nel applied for an order liberating him from prison on bail. The prisoner was originally charged before the Magistrate at Beaufort West with culpable homicide. The papers were sent to the Attorney-General and prisoner was afterwards charged with murder. He was allowed on bail of £100 when he was charged with culpable homicide, but having been charged with murder the Magistrate refused bail, as he had no power to do so in a charge of murder.

The matter was allowed to stand over until next day, in order that notice might be given to the Attorney-General.

Postea (August 30th).

Counsel stated that information had been received that the prisoner had been admitted to the original bail. He consequently withdrew the application.

ROMANO V. THE ADMIRALTY. { 1898. Aug. 29th. „ 30th.

Collision—Damages, direct and consequential—Demurrage.

In an action for damages for a collision, it was ordered by consent that the owners of the ship in default should repair the damaged ship, but the question of consequential damages was left to the Court.

Held *that the owners were also liable to pay for the services of tugs which had been obtained with the advice of those in charge of the ship in default to bring the injured ship into a place of safety, and also for demurrage during the time within which the repairs could have been effected.*

This was an action brought by Santoro Romano as master of the Italian barque Cortezia against Sir R. H. Harris as representative of the Admiralty for damages occasioned by collision of H.M.S Doris with the plaintiff's ship.

The declaration was in the following terms:

1. The plaintiff is the master of the Italian barque Cortezia and he sues in this action as representing the owners of the vessel. The defendant is the Commander-in-Chief on the Cape Naval Station, and as such represents Her Majesty's Lords Commissioners of the Admiralty.

2. On the 30th May, 1898, the Cortesia anchored in Table Bay from Cardiff with a cargo of coals. On the 2nd June, she was moved to a new berth in the bay and was duly anchored there at a proper and suitable spot.

3. On the 3rd of June, 1898, H.M.S. Doris, being a screw steam cruiser of the 2nd class and commanded and manned by officers and men of Her Majesty's Navy, came into Table Bay and anchored at a distance of about 300 fathoms from the Cortezia in a northerly direction.

4. On the night of the 4th of June, the Cortezia, being staunch and tight and well and duly found, was riding at her said berth with two anchors down.

5. The barometer fell steadily during the 4th of June, and was unusually low during

the evening of that day. The wind blew hard from the north during the night of the 4th and the following morning. The Doris with only one anchor down and without steam up was riding ahead of the Cortezia, and at the aforesaid distance from that vessel.

6. At or about seven o'clock on the morning of the 5th of June, the Doris dragged her anchor and drifted down upon and collided with the Cortezia, doing her great damage and causing serious injury to her spars, rigging, and hull.

7. The force of the collision parted one of the cables of the Cortezia, and caused her to drag, and with the advice and concurrence of the officer in charge of the Doris the plaintiff signalled for and obtained the services of two tugs to assist his ship in moving into a safe berth.

8. The said collision was caused and the said damage resulted owing to the negligence and default of those in charge of the Doris—more especially in riding at the said distance from the Cortezia with only one anchor down and without steam up—the wind and sea at the time being high.

9. By reason of the premises the plaintiff will be put to great expense in repairing the Cortezia, and otherwise, and has suffered great loss owing to the necessary detention of the said vessel at this port. He estimates his damage at the sum of £1,500, and he annexes hereto a Memorandum marked with the letter "A," which shows all the particulars of the said amount other than the amount claimed as damage for the detention of the said vessel as aforesaid.

10. The defendant refuses to pay the sum claimed by the plaintiff, but he has offered to pay the sum of £450, which the plaintiff says is wholly inadequate.

The plaintiff claims :

(*a*) Payment of the sum of £1,500 0s. 0d. as aforesaid.

(*b*) Alternate relief.

(*c*) Costs of suit.

Annexure A.

Shipwright and blacksmith's work (above water), as per H. Hyland's tender	750	0	0
Sails, ropes, blocks, rigging, &c., as per Messrs. Mercer & Skaugen's tender	145	0	0
A. R. McKenzie & Co., claim for services rendered by tug Alert	100	0	0
Proprietor's tug John Paterson, services rendered ..., ...	100	0	0
Labour pumping vessel in dock (days and night), 4 day at £3 4s.	12	16	0
Do. do. 15 days at £1...	15	0	0
Dry Dock charges for examining bottom—380 tons at 2s. 6d....	47	10	0
Demurrage from date of vessel being ready for sea, 25th June to date, 6 days - 380 tons at 4d. per register ton, £6 6s. 8d. per day	38	0	0
Notarial expenses and translation fees (estimated) ...	3	3	0
Advertising tenders for repairs	2	10	0
Agency fees for management of ship's business	10	10	0
	£1,224	9	0

NOTE.—The remainder of the claim of £1,500 is for demurrage.

The plea was as follows :

1. The defendant admits all and sundry the allegations in plaintiff's declaration with the exception of the allegations contained in paragraphs 4 and 9 thereof.

2. In reference to paragraph 4 he admits that on the said night the Cortezia was riding at her said berth but denies all the other allegations therein contained, and says specially that on the said night the said vessel was not staunch and tight and well and duly found, and was not riding at her berth with proper and sufficient ground tackle.

3. In reference to paragraph 9 he admits that plaintiff will be put to expense in repairing the Cortezia and has suffered loss owing to the detention of the said vessel at this port, but says that he knows nothing of the other allegations therein contained except that he is not liable for the sum of fifteen hundred pounds therein referred to, or any other sum than is hereinafter tendered, and except that he says that the Cortezia was old, and in very bad condition and wholly unseaworthy at the time of the collision, and in consequence thereof, and not owing to the collision had to be pumped, docked and detained in Table Bay, and part of the said amount of £1,500 which plaintiff now claims to recover is due to this cause and not to the collision.

4. Defendant says that by reason of the contributory negligence of plaintiff in allowing the said Cortezia to ride at anchor on the night of the 4th June, and the morning of the 5th June, 1898, without proper and sufficient ground tackle, the said vessel parted one cable and required the assistance

of two tugs under the circumstances referred to in paragraph 7 of the declaration, on account of which contributory negligence defendant contends that he is not liable in respect of the whole of the expenses of the services of the said two tugs.

5. Defendant further says that he is not liable to any greater amount in respect to the services referred to in the preceding paragraph, than the amount actually payable by the persons represented by plaintiff in this action.

6. Defendant says that the value of the Cortezia before the collision did not exceed £450, and if repaired would not exceed £450, and that if the expense of repairing the injuries caused by the collision would amount to the sum of £750 and £145 as alleged by plaintiff in Schedule A annexed to the declaration, the said Cortezia must after the collision be regarded as a constructive total loss.

7. By reason of the allegations in paragraphs 4, 5 and 6 preceding, defendant says he is in no case further liable to plaintiff than for a sum of £450, or in the alternative (if plaintiff should so prefer) has tendered, and herein again tenders, to pay plaintiff the sum of £200, and to tow the Cortezia round to Simon's Bay and sufficiently repair the damages caused by the collision, and further tenders to pay costs up to date.

By reason of the facts herein set forth the defendant prays that (save in so far as concerns the foregoing tenders) plaintff's claim may be dismissed with costs from this date.

The plaintiff filed a general replication.

Mr. Innes, Q.C. (with him Mr. Upington), appeared for the plaintiff.

Mr. McGregor (with him Mr. Benjamin), for the defendant.

Henry Batezat, manager of Messrs. Thomson, Watson & Co., produced the Italian official shipping register. In it the Cortezia figured in the second category of the first-class.

Cross-examined: The vessel was surveyed at Liverpool last year and re-classed. The survey was conducted by the Italian Lloyds. He thought the vessel was built about thirty years ago.

Santonio Romano, captain of the Cortezia, said he left Cardiff on the 4th March last with coal, and arrived in Table Bay on May 30. His ship was surveyed at Liverpool just before he left. On arriving at Table Bay he anchored, but on the 2nd of June he was moved into an inner berth. On the 3rd of June the Doris arrived, and anchored 300 fathoms away. The wind freshened during the day, and he dropped a second anchor. At seven o'clock on the morning of the 5th June he was called on deck. When he got there the Doris was drifting down on him, dragging her anchors. Seeing this, at the request of the officer of the Doris, he paid out all his cables, ninety fathoms on the port, and sixty fathoms of chain on the starboard. The Doris still drifted, and he told the officer of the Doris that he had no more chain to let out. The Doris came broadside on to her, and did a deal of damage. His port chains parted after the Doris struck her, and the starboard anchor began to drag. The Doris got steam up and got clear of the Cortezia. After that he dragged for a little time, but then the anchor struck. He then signalled to the officer in charge of the Doris to whistle for a tug, and also to send some men to assist him. Immediately a boat was sent to him, with twenty-five men. Soon after this the tug John Paterson came up, and asked if he wanted a new anchor and chain, and he replied to the captain of the tug that he must go on board the Doris and ask them what he had to do. The tug Alert also came up. At 9.30 p.m. the wind freshened up, and his anchor began to drag again. He took soundings, and found there were 18 feet, and his ship was drawing 17 feet 3 inches There was an officer of the Doris on board the Cortezia at the time, and and he called the Alert, which towed him up to his old anchorage, and the John Paterson gave him a new anchor and chain, and he held all night. If the tugs had not assisted him he would have gone ashore. There were 3 feet of water in the well, and the captain of the Doris sent some men over to pump the water out. His vessel was surveyed, and afterwards put in Dry Dock. He called for tenders to repair the damages as recommended by the surveyors. Accounts of £100 from the Alert and £100 from the John Paterson were sent in, and the tenders which were accepted were the lowest submitted. When he arrived here he was under charter to proceed to the Gulf of Mexico to load timber, and this was part of their claim for demurrage.

Cross-examined: The barque was built in 1867. It was purchased last year in London for £300, but he spent £350 upon it afterwards. He had not any receipts to show for this expenditure. This £350 included money for dockage, sailors, and some ship's stores. Before he bought her she did not "go under" a bit whilst she was loading coal at Cardiff. She had always kept afloat. On the voyage out the vessel leaked a little bit. They pumped about fifteen minutes every four hours. Whilst in Table Bay and before the collision he did not pump continuously. He did not pump as much when in Table Bay as he did during the voyage. His ship was seaworthy. He had not been up to the jibboom and the foreyard, but they looked all right. The bulwarks were not rotten. The fo'castle had been repaired for some time, but it had not been repaired with wood from biscuit boxes and packing cases. The rigging was not rotten. It was put in new at Halifax three years ago. A bit of the topsail sheet chain of his vessel fell on the Doris during the collision.

[The chain was put in, and the witness stated that only a yard of this was used. and that length was quite good.] His sails were not so worn that he could tear them with his hands.

[The jibboom and the foreyard were put in, and witness said he could not see that they were rotten inside.] If it had not been for the collision with his boat the Doris would have run aground. He denied having said to a blue-jacket, named Leonard, after the collision, that he did not care, and was not going to trouble himself. He did his utmost to lessen the damage. He admitted having said to the Harbour Board boarding officer that they had been pumping two or three inches an hour on the voyage out. His crew consisted of ten men, including the captain, and the daily expenses were between £2 and £2 10s. a day. He did not know whether the ship, when repaired, was worth £450, or that unrepaired it was worth £100. The vessel was not insured.

Re-examined: After the collision the vessel made eleven inches an hour leakage, whereas during the voyage it was only between two and three. If the collision had not happened he would have taken the vessel across the Atlantic to America. He would have agreed to the Admiralty repairing the damage if he had also been paid all his expenses and the demurrage up to the day on which he put to sea again.

Olous Skaugen, shipmaster and marine surveyor, said he was employed by the Italian Consul to make a survey of the Corteza, along with two others. The report which had been put in with regard to the damages was quite correct. He considered that the ground tackle of the Cortezia was quite sufficient for a vessel of that size. The top part of the ship was more or less defective, but the hull was of sound oak.

In cross-examination: He would not be afraid of making a passage in such a ship. He had sailed in a worse ship.

Captain Caddle, of the S.S. Fifeshire, deposed to having inspected the ship.

Cross-examined: He would not like to pass an opinion on the condition of the piece of the jibboom which had been put in, The port chain was of the right size for a vessel of that tonnage. The starboard chain was somewhat worn, but not very much. He thought the ship would be safe in rough weather.

John George Hodgson, another of the surveyors, said that the report which he had submitted was quite correct.

By the Chief Justice: As regarded the hull of the vessel, she was very good, but her upper works were very bad. Before the accident, if the vessel were well found, she would be worth about £450. After the accident she would not be worth £100.

Henry Thomas Hyland, shipwright, said he tendered for the repairs as per survey. The tender was for £750. He went carefully into the question, and could not do the work for less. Before the accident the vessel would be worth about £600; after the accident about £200.

By the defendant.

Commander De Chair, of H.M.S. Doris, said the cables of the Cortezia were much worn. He would not like to have trusted them. One of the cables parted during the collision. He could not say whether this was due to the impact or to its own weakness. The break might have been due to the collision, but he could not say it was. He did not think the cable was strong enough for such a vessel. If the third anchor on board the Cortezia had been quite ready, according to the instructions of the Port Captain, he did not think the tugs would have been needed to assist the vessel. The collision was a slight one. If the cables had been sufficiently strong and good, the chances were that the Doris might have been able to steam away before the cables parted, as they had steam up five minutes after the collision. The phrase "having a cable ready" meant to a seaman having the anchor hanging over the side of the ship, so that it could be dropped at a second's notice.

Cross-examined: His third anchor was quite ready before the collision. He did not drop it, because they hoped to have the steam up and drive away before the collision took place. The Doris did not come upon the Cortezia on the wind or he was afraid they would have ridden right over her. As soon as the Doris touched the Cortezia her bulwarks collapsed. At the spot where the collision took place there were about 6 fathoms of water, and the Doris was drawing about 4½ fathoms. If the Cortezia had not held the Doris up for about five minutes he did not think she would have drifted ashore, although both dragged after the collision. He was sure that the Doris did not touch the Cortezia under water. Three iron stanchions of an inch and a quarter through were bent by striking the foreyard.

Bernard Hankinson, boarding officer at the Port-office, said he boarded the Cortezia soon after she arrived. The deck was all green and wet amidships. He asked the captain if his ship was leaking, and he replied, "Yes."

George P. Thomas, foreman of the Naval Yard at Simon's Town, said he inspected the Cortezia soon after the collision. He could have repaired the damage done by the collision for £150. This sum referred to the hull, and not to the rigging. About £222 would cover all the ship. This estimate was a liberal one. The deck of the Cortezia was quite green, which indicated that the vessel had leaked considerably on her voyage. He thought the cables were very much worn.

Wm. Jones, boatswain of the Dockyard at Simon's Town, said he had prepared an estimate of the cost of repairing the rigging. The original account was £137 4s. 7d., but deducting the value of the two cables recovered, the balance for the repairs would have been £33 13s. 7d.

Wm. Watts, blacksmith at the Dockyard, Simon's Town, said he had examined the cables of the Cortezia. They were not strong enough for a craft of the size of the Cortezia. He would not put a craft of over 100 tons to such cables. The ironwork was in a bad condition, and was much worn away in certain parts.

Cross-examined: The links of the cable did not break.

Joseph Gay, carpenter's mate at the Dockyard, Simon's Town, corroborated.

Captain Wm. Stephens, Port Captain, stated that on June 20 he surveyed the Cortezia along with Captain Young, of the Clan Ogilvie, and Mr. Hodgson. They found 20 inches of water in the well, and an hour later there was 24 inches. They considered that the vessel was not seaworthy in her present condition, but he considered that it was not worth while repairing her, as the value when repaired would only be £450. According to instructions issued to all captains, every vessel ought to have a third anchor ready, especially in winter. If the captain of the Cortezia had had his third anchor quite ready it would have avoided the necessity of calling in the tugs.

Thomas Leonard, a second-class petty officer, said that immediately after the collision he went on board with several men for the purpose of seeing if he could assist the captain of the Cortezia. For the safety of the ship it was absolutely necessary to call in the tugs. The spare anchor was not ready when he went on board the Cortezia.

Mr. Innes cited *Marsden on Collisions*. *The Pactolus* (Swabey's Ad. Rep., p. 173).

[De Villiers, C.J.: That does not touch the point as to whether damages can be allowed in excess of the value of the ship.]

Where a ship is not a loss we are entitled to a *restitutio in integrum*. We are entitled to abandon her if we like but we cannot be forced to do so. When she is not sunk and is not a total loss it cannot be said that we are only entitled to the value of the ship. It would be a great hardship. Eliminating the tender to repair we cannot get the ship repaired in Cape Town for £450. If the Admiralty tender to repair is accepted we are still entitled to disbursements and the cost of the tugs; also to demurrage up to the date of summons.

Mr. McGregor: Certain damage has been caused which has not resulted directly from the collision, *e.g.*, expenses of the tugs, docking and pumping expenses. The tugs were rendered necessary not only by the collision but by the fact that the Cortezia was not well found, that she was not riding with proper ground tackle, and that her third anchor was not ready. *Maude and Pollock*, *The Margaret* L.I.P.C. 50, p. 67: 6 Prob. Div., p. 76). A distinction is there drawn between the damage caused by the mere collision, and the damage caused by the injury done. *The Monte Rosa* (3 Prob. Div., p. 31); *Marsden on Collisions* (p. 15).

[De Villiers, C.J.: The regulation as to having a third anchor ready is meant for cases of heavy weather where two anchors would not hold, but that was not the case here.]

The cables here were not strong enough to hold the ship.

As to the £200 for the tugs. the ship and cargo are jointly liable, but the plaintiff does not represent the cargo in this action.

[De Villiers, C.J.: The plaintiff is the only person liable for the tugs in the first instance, although he may have recourse against the cargo.]

Kennedy on Salvage. This money is payable on the same principles as salvage. *The Milan* (L.I.N.S. 31, p. 105); *Pritchard's Admiralty Digest* (Vol. I, p. 187). The owners of the cargo have a right against the vessel causing damage. *Pritchard* (p. 110).

[De Villiers, C.J.: The owners would be liable for a general average contribution, but if the Cortezia recovered from the defendant that liability would cease.]

The tender by the defendant is a good tender.

[De Villiers, C.J.: Would you rather pay £350 in addition to the other sums which may be found due, or repair the ship and pay the other sums?]

We would rather repair. As to the charge for demurrage three weeks were sufficient for the repairs.

Mr. Innes accepts the offer to repair. As to the charge for docking and pumping, the evidence shows that the leakage was greater after the collision than before, and therefore the defendant is liable. I admit that we are only entitled to demurrage for nineteen days, that is, to the date of summons.

De Villiers, C.J.: The case has been much simplified by the admissions made on behalf of the Admiralty. It is admitted that the collision did take place as alleged, that it was caused by the negligence of those in charge of the Doris, that the force of the collision parted one by the cables of the Cortezia, and caused her to drag, and that, with the advice of the officer in charge of the Doris, the plaintiff signalled for and obtained the services of two tugs to assist his ship in moving to a safe berth. The only question, therefore, to be determined is that of damages. The plaintiff claims the sum of £750, being the tender he has received for repairs, and £145 for the repair of sails, &c. The value of the vessel, however, did not exceed £450 and the Court would not, in any case, award as direct damages more than the value of the ship. The lowest value placed on the ship after the collison is £100, and under ordinary circumstances the difference between the value of the ship before and after the collision would be a fair criterion of the direct damages to be awarded. But the defendant has offered to have the repairs done by the Admiralty, and as the parties have agreed to this course in preference to the payment of £350 for the purpose of repairs the Court will make an order in terms of the offer. There remains then the question of consequential damages. As to the two items of £100 each for the services of the two tugs they must be allowed, seeing that it is admitted they were signalled for and obtained with the consent of the officer in charge of the Doris, and that but for the assistance the Cortezia would probably have become a wreck. Then as to demurrage, there can be no doubt that loss has been suffered by the enforced idleness of the ship, but it is not quite clear that the repairs could not have been effected within nineteen days after the collision. The Court will, therefore, allow damages by way of demurrage at £5 per day for nineteen days, that is, to the date of the summons. The Court will also allow the items for docking, seeing that it was necessary to dock the ship owing to the increased leakage caused by the collision. The damages awarded will be £376, with costs.

[Plaintiff's Attorneys, Messrs. J. & H. Reid & Nephew; Defendant's Attorneys Messrs. Fairbridge, Arderne, & Lawton.]

SUPREME COURT

[Before the Right Hon. Sir J. H. **DE VILLIERS**, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice **BUCHANAN**, and the Hon. Mr. Justice **MAASDORP**.]

JULISON V. JULISON. { 1898. Aug. 30th.

This was an action for divorce, brought by Frederick Augustus Julison against his wife by reason of her adultery.

Mr. Buchanan appeared for the plaintiff; the defendant was not represented.

The plaintiff said he was married to the defendant on the 23rd July, 1878. He and his wife lived happily together until 1896. They then let a room in their house to a man named Seale, and since then his wife and Seale had been in league together. His wife started to drink heavily about twelve months ago. On one night in 1898 he went home and found her speechlessly drunk. They had had eleven children, but only two, aged twelve and eighteen, were alive now. His wife and elder daughter left him and went to live with Seale, on the Claremont Flats.

Ada Tuke said that Seale took Mrs. Julison and his daughter to live at her house. All three lived in the same room.

The decree was granted, plaintiff to have the custody of the younger child.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné.

CROOKS AND CO. V. MURRAY. { 1898. Aug. 30th.

Costs—Tender.

This was an action in which the plaintiffs claimed the sum of £218 17s. 2d. as the purchase price of certain one thousand cases of kerosene oil. The plea stated that owing to the non-delivery of the oil within a reasonable time the defendant had cancelled the contract of sale, but that after further negotiations it was agreed on the 21st July that he should take delivery on the 22nd, on which day he was to pay the amount to one T. D. Jones, the plaintiffs' agent, and receive certain documents from the latter; that about 4 p.m. on the 22nd defendant tendered payment, but Jones refused to accept it or to hand over the documents; that plaintiffs wrongfully caused a summons to be issued against the defendant on the 22nd July, and when defendant's attorney afterwards tendered to plaintiff's attorney his cheque for the amount, plaintiff's attorney accepted the cheque, but wrongfully refused to deliver up the necessary documents, claiming the right to hold them until the costs of the summons were paid. Upon this payment of the cheque was stopped. The defendants again repeated their tender. The plaintiffs in their replication said that the defendant's attorney called on Jones on the 22nd July after 4 p.m., but was informed that the matter had been placed in the hands of the plaintiff's attorneys payment not having been tendered during banking hours; that the defendant's attorney did not make a proper tender to the said Jones at that interview, nor did he call on or make any tender on the 22nd July to the plaintiff's attorney; that the plaintiff properly and not prematurely caused summons to be issued on the 22nd July at 4.10 p.m., that no payment to the plaintiffs or their agents was made or received till the 25th July, when plaintiff's refused to accept the same or deliver up documents until payment of the legal costs properly incurred. A general rejoinder was filed.

After the pleadings had been closed a paper was drawn up between the parties containing the following admissions:

1. That prior to the 21st July payment was duly demanded for the amount sued for.

2. That on the 22nd July, 1898, the defendant had sufficient funds to meet the claim had the parties come to a settlement on that day.

3. That on the 23rd July, 1898, the defendant's attorney posted a letter to the plaintiffs' attorney containing a cheque for £218 17s. 2d., which was received by the latter on the 25th July, 1898, and was presented to the bank on which the same was drawn, but payment of the same had been previously stopped on the same day.

4. That summons was issued at 3.50 p.m. on 22nd July, 1898.

Mr. Close appeared for the plaintiffs.

Mr. Buchanan for the defendant.

T. D. Jones, the South African representative of Messrs. Crooks & Co., said that he had several interviews with the defendant, with the result that the latter had promised to pay the money which he claimed, £218 17s. 2d., on a contract, but he had refused to do so.

Du Preez, defendant's attorney, came to him between three and five minutes after 4 p.m. on the 22nd July. No tender was made: he did not offer a cheque; he said a cheque was written or about to be written; witness would have accepted a tender if made.

G. Trollip, attorney for plaintiffs, said, he had received the documents from plaintiffs at 3.30. He had no communication until 26th July, when a cheque was enclosed. He presented the cheque and found it stopped.

D. Matcham, partner in the firm of Matcham & Co., said that he went to Jones on the 22nd July, a few minutes after 4 p.m., and told him Murray was then signing a cheque; asked him to step up; his office was on next floor to plaintiff; Jones said he would have nothing to do with it, it was after banking hours. Witness went up and told defendant. Du Preez and witness then went down and Du Preez asked if he would come up. He said it was after banking hours. Nothing was said about a cheque;

he said it was in the hands of his attorney Mr. Trollip and we could go to him. Du Preez asked him to send for the papers. He refused.

After argument,

Judgment was given for the plaintiffs with costs.

[Plaintiffs' Attorney, Mr. Gus Trollip; Defendant's Attorney, Mr. H. du Preez.]

IN THE ESTATE OF THE LATE GEORGE LODEWIJK MEIRING. { 1898. Aug. 30th.

Will—Construction—Bond.

This was an application by the widow of G. L. Meiring. By the will of the said Meiring, the survivor was given the right to take over certain landed property for the sum of £800, on condition that a bond should be passed thereon to secure the heirs of the first-dying: but if the survivor declined to take it over it must like the rest of the estate be sold by public auction, the survivor in that case passing a general bond. There was due from the joint estate to the heirs of the testator £935 1s. 9d., being one-half of the estate, but the survivor was entitled to the interest and usufruct thereof during her life.

The petitioner had sold the property mentioned at public auction for £1,400 and executed a general bond for £935 1s. 9d. in favour of the executors of the estate in trust for the heirs. The Registrar of Deeds had refused, however, to pass transfer and register the bond on the ground that the passing and transfer of the general bond was not a sufficient compliance with the terms of the will, but required that the petitioner, if she took transfer, should pass a mortgage bond in favour of the heirs.

The petitioner alleged that if she were to pass the said mortgage bond it would have to be cancelled immediately after it had been passed in order to allow of the transfer to the purchaser: and it would be impossible to obtain the necessary consents to such cancellation, inasmuch as some of the heirs who would be interested in such bond are minors and some are at present undetermined.

That the sum of £935 1s. 9d. was at present deposited with the General Estate and Orphan Chamber to the credit of the testator's estate to be administered in terms of the will.

Wherefore she prayed for an order authorising:

(*a*) Transfer to herself of the said property without her passing a bond thereon;

(*b*) Subsequent transfer from her to the purchaser;

(*c*) Registration of the general bond passed by her as duly securing the one-half of the estate due to the heirs upon her death.

As an alternative prayer to (*c*) she asked for an order that the sum of £935 1s. 9d. be retained and invested by the General Estate and Orphan Chamber, for account of the testator's estate until the death of the petitioner, the interest or income from such investment to be paid to her

Mr. Currey appeared for the petitioner.

The Court granted an order in terms (*a*) and (*b*) and the alternative prayer of the petition, substituting in the latter the words "heirs of the deceased" instead of "testator's estate."

[Applicant's Attorneys, Messrs. Findlay & Tait.]

IN THE INSOLVENT ESTATE OF CHARLES EDWARD TATTERSALL. { 1898. Aug. 30th

Mr. Close applied for the appointment of a commissioner to examine certain persons.

The application was granted, and Mr. Buchanan appointed commissioner.

CHABAUD V. PAGDEN.—*Re* CHABAUD AND PAGDEN, IN LIQUIDATION. { 1898. Aug. 30th.

Receiver — Increase of powers by Court.

Where partners had appointed a receiver to wind up their business and under the deed of dissolution he was empowered inter alia *to adjust and settle debts due by the firm with the consent of the partners, and disputes arose between the partners as to whether certain claims were private or partnership debts, and one of the partners applied for the appointment of an official liquidator, the Court refused the application but by consent gave power to the receiver to pay claims without the consent of the partners.*

This was an application on notice calling upon the respondent to show cause why an order should not be granted placing the business, lately carried on by the applicant and the respondent at Port Elizabeth under the style or firm of Chabaud & Pagden as attorneys and notaries public, in official liquidation, and why the Court should not appoint a fit and proper person to liquidate the same, and also to show cause why the firm of Chabaud & Pagden should not be ordered to pay the costs of the application. On the 31st May last the firm was dissolved by mutual consent, and a deed of dissolution was entered into under which Joseph Robinson was appointed liquidator, to whom the late partners jointly and severally also gave an irrevocable power of attorney, which empowered him, *inter alia*, to settle and adjust all debts and outstandings due by the firm, after receiving the consent of the partners, and thereafter to hand over to them their respective shares as provided for in the deed of dissolution.

The petitioner alleged that the sums of £34 19s. and £26 11s. were due by the firm of Chabaud & Pagden to Messrs. A. H. Reid and T. H. Hitchin respectively, as and for witnesses' expenses in a certain suit, *Whyte* v. *Chabaud*, decided in the Eastern Districts Court, whereof the said firm received payment.

That the petitioner had repeatedly requested the liquidator to pay the amount so due, but that the respondent refused to consent thereto, and that the said A. H. Reid threatened to take legal proceedings against the said firm for the recovery of the amount due.

That differences and disputes had arisen, and were constantly arising, in regard to the liquidation of the said business, and that it was impossible to proceed satisfactorily with the liquidation on account thereof, and that the petitioner had revoked the power of attorney to the liquidator, in so far as he was concerned, in consequence thereof.

That the petitioner thought that it was necessary and desirable that an official liquidator should be appointed for the said business, and that Mr. John Dean Simmons, the secretary of the Ægis Assurance and Trust Company of Port Elizabeth, was a fit and proper person to be appointed liquidator.

The position taken up by the respondent was that the late firm of Chabaud & Pagden acted as attorneys for the defendant (the applicant) in the case of *Whyte* v. *Chabaud*, and that of the sum of £96 received from Whyte's attorneys as part of the taxed costs £78 had been expended in counsel's fees and legal expenses, and that the balance (£18) was placed to Mr. Chabaud's credit, but that there was no legal obligation on the firm of Chabaud & Pagden to pay the witnesses' expenses, the applicant alone being liable for them personally.

He further pointed out that the total taxed bill of costs amounted to £150 or thereabouts, from which Whyte's attorneys deducted £56 odd, due by Mr. Chabaud personally to Whyte for tender and costs, and that if Mr. Chabaud paid the amount of this deduction to the liquidators there would be ample funds to pay Messrs. Reid & Hitchin their expenses, but that it was a matter with which the firm of Chabaud & Pagden had no concern, the firm not being liable for the private debts of the partners.

The respondent further denied that differences and disputes, other than on the question of the witnesses, expenses referred to above, had arisen in the liquidation which he said was proceeding satisfactorily and as speedily as possible.

He submitted that it was not competent for the applicant under the circumstances to revoke the power of attorney or to cancel the appointment of the liquidator, that appointment being a condition of the agreement of dissolution.

He desired that the liquidator should continue to act, and he said that having worked with the accounts and books of the firm for a period of over two months he was now intimately acquainted with them, and was in a better position to bring the liquidation to a speedy and satisfactory settlement than any official or other liquidator could possibly be.

He lastly submitted that there was no necessity for the appointment of any official or fresh liquidator, and he objected to the firm of Chabaud & Pagden being made liable for any costs in the matter.

In his answering affidavit the applicant alleged that the liquidator had been unfriendly to him, and had displayed great partiality, and that he believed that his interests in the partnership would be seriously prejudiced unless a receiver responsible to the Court were appointed, with full power to wind up the affairs of the said partnership.

Mr. Innes, Q.C., for the applicant: I cannot press that part of the application which asks for the appointment of an official liquidator as the partnership is not a company registered under the Companies Act. The receiver has, however, in his possession sufficient funds to pay the witnesses in *Whyte* v. *Chabaud*, and he should have paid them. These witnesses now threaten an action to recover their expenses, and the firm should not put to any expense in the matter.

Mr. Sheil, Q.C., for the respondent: It seems clear that the dispute in this case between Mr. Chabaud and Mr. Pagden has arisen over the question whether the firm of Chabaud and Pagden are liable to pay the expenses of the witnesses Reid and Hitchin in the case of *White* v. *Chabaud*. On this point it is submitted that there can be no doubt that the position taken up by Mr. Pagden is correct: There is no privity of contract between a firm of attorneys and witnesses upon whom they have served subpoenas on behalf of their client, nor are they in the absence of a special guarantee liable for such witnesses expenses, consequently in this case Reid and Hitchin could not maintain an action against Chabaud and Pagden, their remedy would clearly be against Chabaud personally. See *Robins* v. *Bridge* (3 M. and W., 114). Further the power is a joint and irrevocable power of attorney executed in terms of the Deed of Dissolution and cannot be revoked by one of the partners without the consent of the other: An irrevocable power can of course be revoked in certain cases. See *Voet* (17, 1, 17); *Story on Agency* (sections 463, 464 and 476): *Fick* v. *Bierman* (2 Juta, 35) but no such circumstances are present in this case. Valuable consideration was given for the power and in such a case, even if Pagden had not been a party to it, it could not be revoked until at least a reasonable time had elapsed within which the mandate could have been completed. *Koch* v. *Mair* (11 S.C.R., 71); *Story on Agency* (section 477.) Again there is no precedent for the present application. No grounds have been shown why Mr. Robinson should be removed from his position as liquidator. The allegations that the liquidator is unfriendly to the applicant and that he has displayed great partiality are pure afterthoughts made by the applicant in his replying affidavit to which the liquidator has no opportunity of replying.

[De Villiers, C.J.: Is there any objection to the Courts conferring power upon the receiver to settle claims without the consent of the partners?]

Counsel consented to this suggestion:

[De Villiers, C.J.: It is quite clear that the present application cannot be granted. As counsel on both sides however consent, the Court will empower Mr. Robinson to pay claims against the firm without the consent of the partners.]

[Applicant's Attorneys, Van Zyl & Buissinné; Respondent's Attorney, A. G. Syfret.]

Ex parte ALIDA DE VRIES. { 1898. Aug. 30th.

Derelict Lands Act.

An order for registration of title under Derelict Lands Act refused.

This was an application for an order for registration of title under the Derelict Lands Act.

1. The petition stated that the petitioner was the registered owner of certain land called Babylonia, being portion of a portion of the original farm L'Ormarius in the Paarl.

2. That the remaining extent of L'Ormarius was the property of P. A. van der Byl.

3. That petitioner and his predecessors in title had used and cultivated a certain vineyard up to the boundary of the vineyard of Van der Byl.

4. That one C. L. van der Merwe was the registered owner of the remainder of that portion of L'Ormarius, from which Babylonia was deducted, consisting of 3 morgen 496 square roods of quitrent, and a freehold area which in his transfer was described as measuring 2 morgen 120 square roods, whereas the power-of-attorney authorising transfer to be passed into his name, and the transfer of his predecessors in title described as 299 square roods 11 square feet.

5. That the difference between 2 morgen 120 square roods, and 299 square roods 11 square feet represented the piece of land used by petitioner and her predecessors as a vineyard as aforesaid.

6. That the manner in which the piece of vineyard was originally acquired by petitioner's predecessor in title, one Brink, was described in accompanying affidavits but he failed and so did the subsequent owners to take transfer thereof, although the land was in their occupation, and several of her predecessors had become insolvent and the others were dead.

Accompanying affidavits alleged that the piece of land in question had been sold to

W. C. J. Brink, the owner of Babylonia for £75 somewhere between the years 1856 and 1860, but that Brink had failed to take transfer, but that ever since 1860 Brink and his successors in title had been in occupation of the land and cultivated and used the vineyard thereon.

Mr. Innes, Q.C., appeared for the applicant.

[Maasdorp, J.: The applicant wants to have property registered in her name which is registered in the name of another person. It is a question whether this case comes under the Derelict Lands Act or whether an action should be brought.]

Mr. Innes: There is no case in which the Court has compelled a person in whose name property is registered to transfer property acquired by prescription. The Act gives no *locus standi*: without it it is not clear that applicant would have any *locus standi* as against Van der Merwe; she did not purchase from him. Van der Merwe bought from an insolvent estate: the ground transferred to him is less than the whole portion by the size of the land the applicant occupies.

The Court refused to make any order, but intimated that the matter might be mentioned again on the 12th September.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné.

IN THE MATTER OF THE APPLICATION OF STEPHANUS JOHANNES VAN DER WALT.

1898. Aug. 30th.

Mr. Sheil, Q.C., applied for an award to be made a rule of Court.—Granted.

IN THE MATTER OF THE PETITION OF THE EXECUTOR DATIVE OF THE ESTATE OF THE LATE JOHN FISHER SEWELL.

Mr. Buchanan applied for a rule *nisi* under the Derelict Lands Act to be made absolute. —Granted.

Ex parte KRAHE.

Mr. Buchanan applied for the rehabilitation of Johan Wilhelm Krahe.—Granted.

IN THE ESTATE OF THE LATE WILLIAM DREDGE.

Mr. Jones applied for an order authorising the sale of certain land.

The application was granted.

IN THE MATTER OF THE MINOR ISADORA DE VILLIERS.

Mr. De Waal applied for an order authorising the payment of a certain sum of money towards the minor's education.

The application was granted.

IN THE ESTATE OF THE LATE MARTHINUS JOHANNES GOEDHALS.

Mr. Buchanan applied for an order authorising the sale of certain property in this estate, and to invest the proceeds for the benefit of the heirs.

The order was granted.

IN THE MATTER OF THE MINOR LOUIS JONAS BOTHA.

Mr. Buchanan applied for leave to raise a sum of £2,900 upon mortgage of landed property bequeathed to the minor.

The application was granted.

IN THE MATTER OF THE PETITION OF WILLIAM SILVER DARTER.

Mr. Benjamin moved that the rule *nisi* granted under the Derelict Lands Act be made absolute.

The application was granted.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

Ex parte MOOLMAN.

1898. Aug. 31st.

On the application of Mr. Buchanan, Mr. Hans Jurgens Moolman was admitted as an attorney and notary.

Ex parte VISSER.

On the application of Mr. Close, Mr. Floris Albertus Visser was admitted as an attorney and notary.

ARDERNE V. LE ROT.

Mr. P. Jones applied for provisional sentence on a mortgage bond for £150.

Granted.

SMITH V. JACOBS.

Mr. Ward applied for provisional sentence on a mortgage bond for £400.

Granted.

NEL V. VAN DER SPUY.

Mr. Gardiner applied for provisional sentence for £300, on a mortgage bond.

Granted.

MCGREGOR V. GRAHAM.

Mr. Close applied for judgment, under Rule 329 (*d*), for £5,000.

Mr. Benjamin, for the defendant, applied for leave to purge the defendant's default.

Judgment had been granted earlier in the term, and on application by defendant leave had been given to reopen the case on condition of his filing his plea within two days. This had not been done, although the plea had been served on the plaintiff within that time.

The Court made no order, intimating that the original judgment was still good but granted plaintiff his costs.

SMITH AND CO. V. STEVENS.

Mr. Gardiner applied for judgment, under Rule 329 (*d*), for £66 12s., for goods sold and delivered.

Granted.

BRAXETT V. ROBERTSON.

Mr. Buchanan moved for judgment, under Rule 329, for £22 14s. 9d., for goods sold and delivered.

STRASBURGER V. ORPEN. { 1898. Aug. 31st.

Defamation—Privileged occasion.

> S. *having information concerning an attempt to smuggle brandy gave notice to* L., *a Customs Officer, at whose request he went to the defendant, the Collector of Customs in Cape Town, for the purpose of making an explanation. Before he could make any explanation the defendant in the presence of* L. *said to* S. "*You are the delinquent.*"
>
> Held, *that these words were libellous.*
>
> Held, *further, that though the evidence showed that* L. *was a clerk subordinate to the defendant, inasmuch as the fact was not clearly set forth in the pleadings the Court could not take into consideration the defence that the occasion was privileged.*

This was an action to recover £1,000, damages for defamation of character, brought by Mr. Lucien Strasburger, residing at Green Point, against Arther Richard Orpen, Collector of Customs, Cape Town. The action arose in connection with a recent case of alleged smuggling in the neighbourhood of plaintiff's residence. On plaintiff proceeding to the office of the defendant to give an explanation in connection with the matter, it was alleged that defendant said to him, "You are the delinquent. What are you doing in this room? You are the culprit. You are the head and principal in this case of smuggling." The plaintiff alleged that this was intended to mean that he was interested in the smuggling matter, and was a person of dishonourable character. The defendant denied using the defamatory words, or that he intended to convey that the plaintiff had broken the law or was a person of dishonourable character.

Mr. Innes, Q.C. (with whom was Mr. Benjamin), appeared for the plaintiff.

Sir Henry Juta, Q.C. (with whom was Mr. P. Jones), for the defendant.

Henry le Sueur, Surveyor of Customs at Cape Town, deposed that in consequence of information he received as to the alleged smuggling, he telephoned to the Docks to have the brandy secured and sent by wagon to the Queen's Warehouse. He then received a message from the Collector of Customs (Mr. Orpen) to the effect that he wished to see him. He at once went to Mr. Orpen's office in Strand-street, and Mr. Strasburger drove there in his trap. He took Mr. Strasburger into Mr. Orpen's room and introduced him, saying "Here is Mr. Strasburger; he has come to give certain information about certain cases of brandy." Mr. Orpen said, "There is nothing before me." Mr. Strasburger then wished to explain matters, but Mr. Orpen said, "But you are the delinquent." Mr. Strasburger told the Collector to repeat what he had said, as he did not quite understand. Mr. Orpen did not repeat the words, but said "You are the person to be blamed." Mr. Strasburger thereupon became very furious and said, "Do you accuse me of being a smuggler? I shall give you no further information, and I shall take further proceedings." Strasburger then left the room, after which defendant ordered witness to search Mr. Strasburger's premises.

By the Court: Witness understood by the words, "You are the delinquent," that Mr. Orpen was in doubt whether Mr. Strasburger had not something to do with it—that he was still in the dark, and wished to have further information before he did anything further in the matter.

Cross-examined: Witness did not hear Mr. Orpen say to Strasburger, "What are you doing in this room?" or "You are the culprit, the head, or principal in this case of smuggling." He heard nothing said about smuggling. He thought the words were used interrogatively.

Re-examined: Witness would not like to say that on this occasion Mr. Orpen spoke in a jocular manner, but in a calm way.

Lucien Strasburger, the plaintiff, stated that at daybreak on the morning of August 8 he was up, and noticed something floating on the water. This turned out to be some cases of brandy. He got assistance and had them landed, and later on, at Mr. Le Sueur's request, he went to the office of Mr. Orpen. Mr. Le Sueur introduced him, and then Mr. Orpen said, "What is he doing in this room? He is the delinquent." Witness asked defendant what he meant, and the latter repeated, "You are the delinquent." Witness could not understand what was meant, and said so, and defendant then said, "You are the culprit: you are the man to be blamed." Witness was quite cool and went away, after saying, "You will hear from me."

This closed the case for the plaintiff.

A. R. Orpen (Collector of Customs), the defendant, deposed that before he became Collector of Customs he was a magistrate for many years, and accustomed to judicial proceedings. At the time Mr. Strasburger was brought to his office by Mr. Le Sueur he had received no reports, except a verbal report by the chief clerk. Witness said, "Le Sueur, I cannot hear what Mr. Strasburger has to say." Mr. Le Sueur turned round to him and said "Why?" Witness replied, "Because he is probably the delinquent." Le Sueur looked towards the plaintiff, and there was something said between them. Then Le Sueur said, "Mr. Strasburger does not understand." Witness explained by saying, "Probably he is the person to be blamed." Mr. Strasburger was entering into an explanation when witness said, "I cannot hear anything." At that the plaintiff became rather violent, and said, "Do you call me a smuggler? You will hear more of this," and left the office.

By De Villiers, C.J.: He suggested that defendant was probably the delinquent because it was reported to him that this brandy had been landed at Strasburger's Canning Factory. He did not take it for granted that that was so, and after what he had heard he did not blame plaintiff in any way, but thought he had acted rather commendably. He didn't make a charge against plaintiff.

Cross-examined: He did not know Martin, plaintiff's clerk, but he knew that the plaintiff was agent for a French line of steamers. He denied that he said to Martin that he would keep his eye on "that line of tramps."

This closed the case for the defence.

[De Villiers, C.J.: Was this not a privileged occasion—the statement being made to a subordinate officer?]

Mr. Innes: That is not specially pleaded. We have only come into court to meet a denial.

[De Villiers, C.J.: Is it necessary to plead that it was a privileged occasion?]

I have no authorities here upon the point, but on general principles it is necessary to plead it, if pleaded we should have to prove malice, and should have to go into all the previous dealings between the parties. The words are actionable and were not used in jest. As they were not addressed to Le Sueur they cannot be privileged. We do not press for heavy damages.

Sir H. Juta: The person to whom the publication was made says that he did not understand the words as libellous. There was no malice. There is one sort of privilege which must be specially pleaded. But in *Villiers* vs. *Pienaar* (1 Sheil, p. 201) privilege was not pleaded, and judgment was given for the defendants on the ground that there was no *animus injuriandi* and that a social duty devolved upon them of making the statements which they did.

Mr. Innes: There is no question here of absolute privilege; what is set up is qualified privilege. *Odgers on Libel* (2nd ed. p. 537). Since the passing of the Judicature Acts privilege and the circumstances must be pleaded. *Animus injuriandi* is presumed from words which are defamatory. In Roman-Dutch Law the *contumalia* or insult is the essence of the action for defamation.

De Villiers, C.J. : It appears from the evidence that on August 7 an attempt at smuggling was made by some persons in the neighbourhood of the plaintiff's place of business, and the articles attempted to be smuggled were some cases of brandy. Mr. Strasburger, when he discovered this brandy being driven ashore, at once gave notice to the proper authorities. On the following day he saw Mr. Le Sueur, and at the request of the latter he accompanied him to the defendant's office for the purpose of giving an explanation. Before he could make that explanation, however, the defendant said to plaintiff, "You are the delinquent," meaning thereby that he was the smuggler, because there had been smuggling, and the delinquent must be the person who has smuggled. Mr. Le Sueur's evidence might be taken as not going beyond what actually took place, and he says that the defendant's words were, "You are the delinquent." I do not think there is much difference between the evidence of Mr. Le Sueur and the plaintiff, but Mr. Le Sueur is the most likely to remember what actually took place. I think it must have been understood that the words meant to convey that the plaintiff was the person who had smuggled. That was a very rash and hasty statement, and it was very insulting to the person who had come there, and who had done his best to give proper information in the matter. I am sure that the defendant himself must feel that he was too hasty in making this statement and charging the person with being the delinquent, especially after that person had been to the trouble of giving information which had come within his knowledge. Therefore I think the Court is bound to hold that this was done *animo injuriandi*, and that these words are libellous. It is a charge of a criminal offence, and a charge which has been made *animo injuriandi*. No question of privilege has really been raised. It does not appear from the declaration what the position of Mr. Le Sueur was towards the defendant. It appears from the evidence that he was a clerk, subordinate to the defendant, but that is not a fact clearly appearing upon the pleadings so as to justify the Court in taking cognisance of that fact, and therefore no reliance can be placed upon this in the arguments of counsel upon the defence of privilege. The Court must therefore dismiss that question, and decide whether these words, used between two ordinary individuals in a matter of this kind, would be considered defamatory and libellous. I think the words were libellous, and therefore the only question is what damages should be awarded. Mr. Innes has stated that the plaintiff does not press for heavy damages, as he only wished to have the matter thrashed out in public and have his character cleared. It is to be regretted that the defendant did not withdraw the words he used instead of saying that his words had been misconstrued. If he had written to the plaintiff saying that he had been hasty in his judgment and withdrew his words, that would have been enough. Some candid confession by defendant that he was hasty would have satisfied plaintiff. As such withdrawal of the words used was not given, the plaintiff was entitled to come into the Court and ask for damages. Under all the circumstances, however, I think the damages should be fixed at 40s. Judgment would be given for 40s. damages and costs.

Buchanan and Maasdorp, J.J., concurred.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorneys, Messrs, J. & H. Reid & Nephew.]

Ex parte GLASS AND WIFE. { 1898. Aug. 31st.

Post-nuptial contract—Registration.

This was an application by Wolff Glass and his wife Bessie Glass (born Diamond), for leave to register a post-nuptial contract

The affidavits in support of the petition showed that the petitioners, who were Germans and had very little knowledge of the English language, had gone on the 4th August to the office of the Resident Magistrate of Uitenhage for the purpose of obtaining a special licence to marry; that they had signed certain documents there and answered certain questions, and that the Magistrate's clerk had then informed them that they could at any time obtain a certificate by paying two shillings and sixpence for the same; they understood this certificate referred to the special licence. On the 7th August they were about to be married by a Jewish minister at Uitenhage, and before the ceremony was performed they signed an ante-nuptial contract in the presence of witnesses and the contract was duly attested by a notary. The minister was then about to commence the marriage ceremony but first asked the petitioners for the special licence; Wolff Glass then stated to him that he had not received paper or document from the Magistrate and described what had occurred as stated above. Glass and the notary then went to the Magistrate for authority to the minister to perform the ceremony and the Magistrate replied to the notary: "He was married to Miss Diamond last Thursday. I married them, the clerk brought them into my office and said they wished to be married, and I performed the ceremony," or words to that effect. Until then the petitioners had no idea that they had been married. The Jewish minister after that performed the Jewish marriage ceremony.

Mr. Close appeared for the applicants.

The order was granted without prejudice to the rights of creditors prior to the registration.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

MORGAN V. HIDDINGH.

1898.
Aug. 31st.
Sept. 12th.

Commission *de benne esse*

Application for a commission to examine a defendant refused where he had left the Colony with the knowledge that the suit was coming on.

This was an application by the defendant Hiddingh for the appointment of a commission to examine himself and his wife in France. The action originated in a claim for damages arising out of an assault alleged by the plaintiff to have been committed upon her; it was alleged that the defendant had since the claim had been made entered into an agreement to pay £27 by way of a compromise but had failed to do so.

Affidavits in support of the application set out that the defendant and his wife were material witnesses and were residing at Pau in France, and that it would cause them great inconvenience and much increase the cost of the suit if their attendance were compulsory.

Answering affidavits stated that the plaintiff would find it extremely difficult if not impossible to be properly represented at Pau, and that the defendant knew that the action was pending when he left the jurisdiction.

Mr. Innes, Q.C., appeared for the applicant.

Sir Henry Juta, Q.C., for the respondent.

The application was allowed to stand over until the 12th September.

Postea (September 12th). After argument,

De Villiers, C.J. said: If the plaintiff opposes the application, the Court ought not to grant it. It would be impossible for her to get anyone to represent her in France, and it might be essential that she should be represented. The defendant and his wife left the Colony with the knowledge that a case was coming on, and it was a small sum, £27, that the plaintiff was willing to compromise the case for. I think that the defendant and his wife should return to the Colony and gave evidence. There will be no order, and the question of costs will stand over.

[Applicant's Attorneys, Messrs. J. & H. Reid & Nephew; Respondent's Attorney, D. Tennant.

[Before the CHIEF JUSTICE and Mr. Justice MAASDORP.]

LINCH V. LINCH.

1898.
Aug. 31st.

This was an action for divorce on the ground of defendant's adultery.

Mr. Benjamin appeared for the plaintiff; there was no appearance on behalf of the defendant.

Francis le Sueur, clerk in charge of the marriage registers at the Colonial Office, produced the certified copy of the marriage register of plaintiff and defendant.

Alfred Linch, the plaintiff, deposed that on June 25, 1890, he was married to the defendant, Wilhelmina Peters. They lived together until July 26 this year, when she left him in consequence of what he discovered as to her relations with a man named Williams. He produced a photograph of the defendant.

Nellie Arentsen said: I know this photograph: on the 26th July, that woman slept at 29, Chiappini-street with a young fellow named Williams. I did not know the woman was plaintiff's wife.

Linch (recalled) said: I saw my wife in the house of last witness.

The Court granted decree of divorce as prayed.

[Plaintiff's Attorney, J Ayliff]

SPRECKLEY V. SPRECKLEY.

Mr. Benjamin appeared for the petitioner in this action for divorce, and moved for leave to sue by substituted service. Leave had been given to sue *in forma pauperis* in the action, and personal service had been ordered. At that time the defendant was believed to be in Johannesburg, but information had been received from the Sheriff of the Transvaal to the effect that defendant had left Johannesburg and gone to Natal, where efforts to find him had been unsuccessful.

The Court ordered personal service if possible; failing that, one publication to be made in a Johannesburg paper, and one in a Natal paper ; returnable October 12.

PETITION OF IGNATIUS WILHELM TERBLANS.

Mr. Buchanan moved that the rule *nisi*, granted under the Derelict Lands Act, be made absolute.

The Court made the rule absolute.

SANDBACH V. SANDBACH.

This was an application of Charles Sandbach for leave to sue his wife, Charlotte Sandbach, by edictal citation for divorce on the ground of her adultery.

Mr. Currey for the plaintiff.

The Court granted the order, personal service to be effected if possible; failing that, one publication in a newspaper circulating in Buckstone, England. Leave was also granted to serve intendit and notice of trial at the same time.

IN THE MATTER OF THE CAPE OF GOOD HOPE BUILDING SOCIETY, IN LIQUIDATION.

1898. Aug. 31st.

Mr. McGregor moved for the confirmation of the report of the liquidators, which was in the following terms:—

1. This society was placed in liquidation under the 135th section of the Company s Act of 1892, under an order granted by your Honourable Court bearing date the 21st day of July, 1898.

2. Prior to the granting of this order your liquidators had been acting as special auditors or investigators of the company's affairs, having been appointed thereto by a resolution of shareholders and depositors at a special meeting called to consider the position of the society when frauds by the late secretary of the institution, W. J. Hancock, came to light in May last.

3. The result of these investigations, which extended over a period of two months, are embodied in a report dated July 7, 1898, and made by the undersigned to the then chairman of the society. We think we cannot do better at this stage than annex a copy for the information of your Honourable Court, as nothing has since transpired to alter the conclusions we then arrived at. Hancock and J. W. Moore, the bookkeeper of the society at the time, and who was acting secretary when Hancock left for England at the end of April, are now under arrest on a charge of fraud and embezzlement, which charges are at the present time being investigated before the Resident Magistrate of Cape Town. Under these circumstances we feel that the ends of justice are not likely to be served by our adding to the particulars which appear in the document annexed hereto, and which has already appeared in the public press.

4. From the report dated July 7 your lordships will observe that 1,834 shares in the society have been issued, which your liquidators are advised are liable for calls as if the company were one of unlimited liability, the registration which took place on August 20, 1897, being, in the opinion of our advisers, of no effect as against the society's creditors.

5. Under date June 3 last a return of shareholders was filed with the Registrar of Deeds, in terms of Company's Act, 1892, by the then acting secretary of the society. A copy of that list is annexed hereto, and we request an order from your Honourable Court settling this list as that of the contributories of the society in terms of section 157 of Act 25 of 1892. It is just possible some slight alterations may be required to this list, and if this proves to be the case, your Honourable Court will be asked to amend the list accordingly.

6. Taking the position to be that shown in the first annexure of this report, a call of £14 per share would be about sufficient to meet the deficiency in the company's assets, but it is within the knowledge of your liquidators that many contributories will be unable to meet the calls which must be made in this matter. Under these circumstances we feel it our duty to recommend to the Court a first call of £20 per share, which we would suggest should bear interest at the rate of 6 per cent. per annum from the date of granting any final order on this report until the date of payment by the contributories. Your liquidators, however, considered that there are many poor contributories, especially those belonging to the small shopkeeper and labouring classes, who, if pressed for the whole call at once, would be unable to meet the same, but who would be desirous of avoiding the sequestration of their estates.

In order, therefore, that the call may not press with undue severity on such, and as payment by instalments would in such cases probably be of advantage to the liquidation, your liquidators desire power to accept payment of the call by instalments.

7. Almost all the debtors of the society are also shareholders, it having been a rule of the society that a borrower must subscribe for one share for every £50 borrowed by him on mortgage. To decline to accept payment of the amounts of respective mortgages until the debtors had paid their calls as well as repaid their advances would in most cases entail very serious hardships, and by forcing on insolvency most probably have the effect of lessening the ultimate amount recoverable on behalf of the society. Your liquidators in such cases have therefore agreed to allow the bonds to be paid off, and where the properties have been sold to permit transfer of such properties, provided the full purchase price thereof be paid into the hands of responsible persons or institutions with an undertaking that this shall not debar the society from recovering any amount which may be due for calls on shares, and unless otherwise directed by your Honourable Court, they purpose pursuing a similar course where they may think it advisable in the future.

8. We purpose at an early date calling upon all creditors to file their claims on the society in form similar to that provided in the case of insolvent estates, and this will probably be effected without undue difficulty, as most of the creditors have lodged claims with the society already. It may, however, be necessary to approach the Court later on to fix a final date under section 166, after which no further claims will be recognised, but we do not apply for any order thereon at present.

9. Your liquidators would ask for an order restraining the Registrar of Deeds from passing transfer or mortgage upon any property belonging to the contributories mentioned in the list annexed without obtaining the consent of your liquidators so soon as that list shall have been confirmed by your Honourable Court, and also that any order on the presentation of this report may act as an interim interdict to that effect.

10. Mr. Paul de Villiers, the attorney to the society, being also a director thereof, has intimated that under these circumstances he would prefer not to act for the liquidators. We have therefore to request the appointment by your Honourable Court of Messrs. Sauer & Standen as attorneys to your liquidators.

11. We have, therefore, to request the order of your Honourable Court upon the following points:

(*a*) For an order settling the list of contributories of the society.

(*b*) The making of a call of £20 per share, with the powers to your liquidators asked for in paragraph 6 of this report.

(*c*) Such order as your Honourable Court may think fit to make on paragraph 7 of this report.

(*d*) An order on the Registrar of Deeds regarding the passing of transfer or mortgage of property registered in the name of any contributory in terms of paragraph 9 of this report.

(*e*) For an order appointing Messrs. Sauer & Standen as attorneys to your liquidators.

To this report was annexed a copy of the report made by the liquidators to the directors of the society, and also a list of the names of the shareholders of the society, numbering 1,834.

The report to the directors was in the following terms:—

Church-square, Cape Town,
July 7, 1898.

The Chairman of the Cape of Good Hope Permanent Building, Land, and Investment Society (Limited), Cape Town.

Dear Sir,—On receipt of your letters of May 6, advising our appointment by your members and depositors as special auditors in consequence of what have since become known as the Hancock frauds, we at once proceeded to enter on the necessary investigation. At that time we found the books were not posted up to date, and this necessary work, coupled with the Whitsun and Easter holidays which supervened, somewhat delayed us in our work, which is even now by no means so complete as we could wish. It has, however, progressed sufficiently to enable us to place this preliminary report before you.

Depositors' Accounts.

According to the general ledger on April 30, 1898, these stood at £44,364 6s. 2d., the deposit ledger, however, on being abstracted gives the figures as:

Fixed deposits	£23,659	0	8
Floating deposits	29,877	12	0
	£53,536	12	8

Deducit debit balances ...	503 11 6
	£53,033 1 2
Showing a discrepancy of ...	£8,668 15 0

At the outset we issued an advertisement asking depositors and others to send in their pass-books for comparison with the ledgers. Most have done so, but there still are some to come in. It became at once evident that the figures mentioned above did not cover the whole discrepancy, for pass-books were produced containing entries for large sums which had never been entered in the ledger, whilst in others the original entries had been manifestly tampered with, *e.g.*, £700 erased and £70 entered instead; £550 entered as £50, and so on.

The examination of these accounts entailed a large amount of labour, but we have now as far as we can adjusted all claims sent in or discovered from the books, as per annexure A to the report, in which the deficiency is given as £31,681 13s. 6d.; add claim by Captain T. H. Williams, since received, see Annexure C, £442 16s. 3d.; deficiency on deposits, £32,124 9s. 9d.

We have in the annexure A given details of each transaction with sixty-three individual customers, as perhaps this will be more convenient, it being manifestly inadvisable for many reasons that these particulars should be made public.

In most cases the repayments were of small amount, and hardly worth tampeing with. The frauds in connection with advances which we have been able to trace were most impudently carried out. Payments were received for bonds and never entered in the books, the cheques being in one case paid to the society's credit (when other moneys were in all probability taken to about the same extent), and in other cases the cheques were endorsed by Hancock, and paid into the credit of his own private banking account.

Annexure B gives a list of accounts still open in the advance ledger, the relative bonds being in each case marked in the bond-book as "Redeemed" by Hancock. This list totals £4,933 1s. 7d., and must be taken as an approximation, as we have only been able to examine securities for loans granted since 1890, and it is possible that loans granted before that date, but paid off since, may also have been the subject of embezzlement.

The two smaller amounts of £53 3s. 9d. and £18 2s. 2d. shown in the annexure may have to be written off as irrecoverable, for we find many small items have been so dealt with in the past, and a few, apparently, are in the same need at the close of the current year. This arises from payments having been made at a faster rate than provided by the terms of the bond, and the office calculations apportioning these payments to capital and interest respectively having been made according to a standard table providing for payments spread over fifteen years, a corresponding difference has gradually accumulated, only in many cases to be discovered when final settlement took place. The total of these entries will probably amount to a few hundred pounds.

On the other hand, the actual embezzlements have exceeded the ledger balances shown—*vide* our notes—but, as before remarked, the total shown should prove approximately correct, and cannot be made more so without production of further proofs of actual amounts paid, which we are only able to give in three instances and after extended inquiries.

Were it compulsory to file all cancelled bonds in the Deeds Office, the tracing of such payments would be much simplified, but the present practice of cancelling bonds and then handing them back to the former debtor, or whoever produces them for cancellation, makes it impossible to secure inspection of the signature of the creditor, unless the bond itself can be procured.

We are not able to give a list of detailed valuations of investments held, but from general inquiries made, we see no reason so far to anticipate any shortfall on the bonds.

With regard to the landed properties held by the society, a surplus will probably be obtainable on the Greenmarket-square building, and taking this into account we think the book value of this account as a whole should be realised.

Total defalcations may therefore be set down as given above:

Deposits...	£32,124 9 9
Advance account	4,933 1 7
	£37,057 11 4

In connection with these figures, an examination of Hancock's private banking account is not uninteresting. From a copy placed at our disposal by the trustee of his insolvent estate, we compile the following summary:

	Deposits.			Withdrawals.		
	£	s.	d.	£	s.	d.
April 1, 1895, to June 30, 1895 ...	479	0	8	454	11	8
Half-year ended—						
Dec. 31, 1895 ...	4,579	10	6	4,594	3	5
June 30, 1896 ...	3,580	1	9	3,573	9	4
Dec. 31, 1896 ...	5,645	15	10	5,653	17	4
June 30, 1897 ...	14,840	11	5	14,824	2	0
Dec. 31, 1897 ...	9,176	8	11	9,173	14	3
Dec. 1, 1897, to May 3, 1898 ...	8,066	6	9	8,088	3	8
Balance to his credit	...			5	14	2
Total in 36 mths	£46,367	15	10	£46,367	15	10

or an average of just under £1,288 per month. Taking into account the fact that Hancock's salary for the same period averaged £28 2s. 6d. per month, and that he carried on a small grocery business at Observatory-road during the last year or two, these figures closely approximate our estimate of the defalcations.

This account shows Hancock had regularly converted moneys of the society to his own uses, and the annexure C gives a list of defalcations which either agree, or closely agree, with the amounts deposited to the credit of his own private banking account on the same or approximately the same dates. We must also direct attention to the fact that Hancock's own account in the society's books was overdrawn on April 30, 1898, to the extent of £780 18s. 9d. (see annexure D).

Society's Books.

From remarks made earlier in this report, it will have been evident that these have tampered with to a serious extent. The entries in the rough cash-book were made by whoever actually received the cash, *i.e.*, by Hancock, J. W. Moore (who was bookkeeper), or a director; but it appears to us that most of the alterations therein have been made (as far as we can judge by appearances) by Hancock. The figures in this book have repeatedly been erased and others entered, whilst on some occasions either the first figure or the final cipher has been deleted. The fair cash-book and depositors' ledger, apparently written by Moore, have been neatly kept, but here the altered entries have been copied and continued even when the originals were his own figures, and the ledger has been manipulated in some instances quite independently, so that it is hopeless attempting to secure a true balance. Much time was unfortunately spent on this part of the work in the earlier stages, before the more serious criminal acts came to light. The pass-books issued to the society's customers are in the main correct, but the pernicious system seems to have obtained of entering interest therein before such interest appeared in the ledger, and this practice was not confined to one official. In some cases the interest so entered did not agree with the capital and rate shown on the ledger, and the effect of these would undoubtedly be to allay suspicion on the part of the customer.

It is noteworthy that ever since he joined the society Hancock has balanced off the cash-book himself, and inserted the adjustment with banker's pass-book.

This latter book has on several occasions been tampered with. The result of our inquiries leads us to the conclusion that the pass-book was altered to agree with the cash-book adjustment when in Greenmarket-square, and again altered to the correct figure when sent to the bank to be made up periodically. Certain it is that the bank debits for "interest on overdraft" were so erased, and these words did not appear, but a cheque number was inserted instead, and in most cases the balance then brought down made to come on the right side.

Annexure D gives a list of general ledger balances at April 30, 1898, since when there has been practically no change in the position.

From this, omitting the impersonal and administrative accounts and shareholders' capitals, we get the following position (omitting the shillings and pence for clearness):

Overdraft at bankers	£4,242
Deposits	44,364
Defalcations on deposits	32,124
Liabilities	£80,730
Mortgages	£49,905
Properties held	10,228
	£60,133
Less bonds cancelled but still appearing in ledger	4 933
Assets	£55,200

Leaving a sum of £25,530 to be provided outside the assets of the society.

Two matters may approximately be dealt with here. In the first place, the bonds to the society are not payable after notice in the ordinary way, but by instalments, in most cases spread over a period of fifteen years; and secondly, according to your rules, no borrower could obtain a loan unless he took up one share for every £50 advanced by the society on mortgage. There are many shareholders who are not borrowers, but all borrowers must be shareholders. It therefore follows that the very persons who are under direct obligation for advances are also liable for calls on the shares they have taken up under the rule mentioned above.

Another source of weakness has been the extent to which deposits have been received compared with the limited paid-up resources of the institution—a subject on which the Government Actuary made some very pertinent remarks in his report presented to Parliament some little time back.

The returns filed with the Deeds Office so late as June 3, 1898, show there were then issued:

1,483 shares of £50 each, equal to	£91,700	0	0
On which had been paid up	8,733	9	5
	£82,966	10	7

under the limited liability constitution of the society, which took effect on August 20, 1897.

There does not seem to be any limitation on the uncalled capital of the society in the memorandum of association, but in the rules printed with them and also filed in the Deeds Office, each share is stated to be of the ultimate value of £50. In view of the great uncertainty which exists on this subject, as well as on that of the liability of members in respect of deposits made prior to August 20 last, both of which points will most probably be brought up at the forthcoming meeting, we would suggest that counsel's opinion be taken thereon, so that those interested may know exactly what position they have to face.

In conclusion, we would like to mention that it has been simply impossible to bring up this report before. Even since annexure A was written one defalcation has transpired, and been added in the text hereof.—Yours faithfully,

(Signed) G. W. STEYTLER.
(Signed) HY. GIBSON.

Mr. Schreiner, Q.C., applied for an order removing the name of one Mathew from the list of contributories. He pointed out however that there were a number of other applications to be made for the removal of names from the list of contributories. He himself appeared for three individuals and a group of fourteen, and another group. All these applications were divergent. There were very important points in connection with this liquidation, and as it was the first of its kind it was very desirable that there should be full opportunity for presenting the case before the Court. All the applicants said that the liquidators had never given notice that they were going to apply that day to have the list of contributories settled and the call made. As a rule such a notification was made—at least it was done in the case of the Cape of Good Hope Bank. He represented a certain number of people, and it would be hard if there were now any settlement of a list of contributories finally or a call made finally; and his suggestion would be that the Court should order a rule *nisi* to be published.

The Court ordered that sub-sections (*c*) and (*e*) of section 11 of the report should be confirmed, and granted a rule *nisi* calling upon all persons whose names appeared on the list of contributories to show cause by September 12 why the list should not be settled, and why they should not be called upon to pay the call of £20 per share; notice of objection to be given by September 9.

The order asked for under sub-section (*d*) was refused.

[Attorneys for the liquidators, Messrs. Sauer & Standen.]

SMIT V. SMIT.

This was a case in which the plaintiff asked for leave to sue her husband by edictal citation for restitution of conjugal rights, failing which for divorce.

Mr. Currey appeared for the plaintiff.

The Court granted the order, personal service to be effected, if possible, failing which one publication in the "Government Gazette" and one in the "East London Dispatch." Return day, October 12. Leave to serve intendit of notice of trial at the same time also granted.

BROWN V. BROWN.

This was an application for the removal of the cause to the Circuit Court at Mossel Bay.

Mr. Close for the applicant.

Granted.

PETITION OF JOHN WILLIAM BROOKS AND OTHERS.

Mr. Gardiner moved for an amendment of an order of Court of June 13 last. The amendment consisted of the alteration of a Christian name only.

Granted.

DUNMEYER V. PRIESTLY. { 1898. Aug. 31st.

This was an application for an order discharging a notice of appeal lodged by the respondent.

The appeal, which was against a judgment of the Resident Magistrate's Court of Cape Town, was noted upon the 28th June, 1898, but had not yet been prosecuted.

The respondent filed an affidavit alleging that he was present when the appeal was noted by his agent, and imagined that it would be heard in due course without his having anything further to do in the matter. That it appeared that his agent was expecting him to call, and give him further instructions, and consequently did not proceed with the appeal. He said further that he had no intention of abandoning the appeal, and was anxious that it should be argued at the first opportunity.

Mr. Upington for the applicant: An unreasonable time has elapsed. Act 20 of 1856, section 33.

Mr. Ward for the respondent: *Cloete's Trustees* v. *Green* (5 Sheil, p. 264): *Stemmet* v. *Trustees of the Independent Companion Society* (4 Sheil, p. 203).

Mr. Upington: The appeal should be set down within fourteen days, or as early as possible after that. *Rymer* v. *Solomon* (9 Juta, p. 470).

De Villiers, C.J.: There are special circumstances in this case if it be true that this man is an illiterate man, and did not know that his agent was waiting for him. The Court will give him until the first day of next term to proceed with his appeal; the costs of the application to stand over. The appeal must be set down for hearing on the first day of next term.

[Applicant's Attorney, D. Tennant; Respondent's Attorneys, Messrs. Scanlen & Syfret.]

REGINA V. HUDSON { 1898. Aug. 31st.

Tramway Act—Act 29 of 1896, sections 2, 21, 22—Onus of proof.

H. *was found guilty of contravening Act* 29 *of* 1896, *section* 31, *by wilfully obstructing a tram car at a certain siding or passing place. Section* 2 *of the Act provided that no passing place should be constructed except at places approved of by the road authority and by the Municipal Council.*

Held, on appeal, *that the onus of proving the illegality of the car being at that particular siding place lay upon* H.

This was an appeal from a sentence passed upon the appellant by the Resident Magistrate of Wynberg. The appellant was charged with contravening Act 29 of 1896, seccion 31, in that upon or about the 15th day of July, 1898, and at Claremont, the said Benjamin Hudson, jun., did wrongfully, unlawfully, and wilfully obstruct or hinder a car or conveyance, the property of the Southern Suburbs of Cape Town Tramway Company Limited, by means of two horses harnessed to a vehicle and refusing to remove such obstruction on the main road at Claremont aforesaid. The accused pleaded not guilty. The evidence for the prosecution went to show that the obstruction complained of was caused by the appellant's refusing to remove a wagon loaded with timber standing on the tram-line at one of the sidings, and that in consequence the tram was delayed for eight minutes. At the conclusion of the evidence for the prosecution the defendant's attorney applied for the dismissal of the accused on the grounds that it had not been proved that the consent of the road authority and the Municipal Council had been obtained for the construction of the siding in the passing place or the length of the loop-line, as is required by the proviso to section 2 of Act 29 of 1896. The Court ruled that such consent is always in cases such as the present presumed, and that the onus of disproving such consent is thrown upon the defence who calls it in question, and that it is presumed that an existing state of things has its existence in a legal origin. The Magistrate found the accused guilty, and fined him 2s. 6d. He gave the following reasons for his judgment: "This is the first case under the Act 29 of 1896 which has been brought before me. I did not consider it necessary for the prosecution to prove the consent of corporate bodies to an existing state of things of which they were cognisant, and considered that it was fair to presume that all legal steps and necessary formalities had been complied with by the Divisional Council and Municipality, and that it rested with the defence to rebut such presumption. This was not done. On the question of fact there was no doubt in my mind that Hudson did delay the tramcar, as stated by the motorman and guard, for about eight minutes, that he could easily have moved his wagon on and allowed the tramcar to pass, as is admitted by his own witness, Johannes Smit, in his cross-examination, and that he would not have been inconvenienced by so doing. He, however, wished to finish off-loading his wagon, and did not finish, and consequently delayed the tram. I considered that this was such an obstruction as was contemplated by the Act, and found the accused guilty. I inflicted the nominal fine of 2s. 6d., as I looked upon the case as a test case."

The accused now appealed.

Mr. Schreiner, Q.C., was heard in support of the appeal.

Mr. Sheil, Q.C., for the respondent.

Mr. Schreiner: The Tramway Act, Act 29 of 1896, confers a franchise on the Tramway Company over a public road, and the company must prove that they have conformed to the provisions of the Act. Section 2 enacts: "That no passing place shall be constructed, except at places approved of by the road authority, and by each Municipal Council as respects that section of the tramway within its jurisdiction, and the length of the loop-lines at such passing place shall also be subject to such approval." Section 6 enacts that: "The position of the tram lines in the streets or roads traversed shall be such as may be determined by the road authority previous to the construction thereof, and the said lines shall be laid by the said company in such position as the road authority may direct."

[De Villiers, C.J.: Does not the existence of the line show the approval?]

A municipality has no eyes of its own and can act only by resolution; the line may have been put down without approval. No resolution has been produced. The maxim *Omnia rite esse acta praesumuntur* is confined to official acts. *Maxwell on the Interpretation of Statutes* (pp 399, 421) as to the strict construction of statutes encroaching on the rights of the subject and giving privileges. Section 22: "The tramways shall be so constructed and worked as not to hinder the safe passage of the ordinary traffic upon and across the roads, streets and public places, or to endanger the safety of the public." Section 32: "Nothing in this Act contained shall authorise the company in any manner to obstruct or hinder the safe passage or crossing of the ordinary traffic on any roads or streets in which such tramway shall have been made, &c." The appellant was unloading and offered to unload as speedily as possible; if it be held that he had no right to unload for a reasonable time then the principle laid down in the sections quoted is reversed and the company will have a preference over the public in the use of the main road.

De Villiers, C.J.: The policy of having a tramway line on the main road is perhaps doubtful, as everyone who has travelled along that road has experienced considerable inconvenience from the existence of the tramlines, but the Court has simply to do with the Act passed by the Legislature for the purpose of the construction of this particular line. We must assume that the line was constructed for the public benefit, as well as for the convenience and profit of the company. The thirty-first section of the Act provides for cases of wilful obstruction, and the question is, did the appellant wilfully obstruct the car while moving from one place to another on the tramway line? The appellant was standing there with a wagon, unloading some planks, when the car came up, and he was requested to move out of the way. He said he would do so as soon as he was finished unloading, but according to the evidence of the motorman eight minutes elapsed between the arrival of the tram and his moving away. It was proved also that the appellant could, by simply moving, have allowed the tram to pass, and then have come back into the position in which he was, and finished his off-loading in a very short time, without much more inconvenience to himself, and without interfering with the car. The appellant claimed his right to use the road, but in my opinion it was wilful obstruction, because it was easy for appellant to move out of the way when requested to do so. The car could not go out of the way, as it could only go upon the lines, whereas the appellant had the whole roadway to himself. If this be true, there has been an infringement of the section, in that appellant has wilfully obstructed and hindered a tramcar. But then, says the appellant, that line has no right to be there, because the loop-line could only be made subject to the approval of the road authorities. Surely then it lies upon him to prove that that line was not legal. Seeing that he was charged in terms of the Act with contravening the section, the onus lay upon him to show the illegality of the car being there. He has not proved that. Surely in a case of this kind it was as easy to prove the negative as the affirmative. He might have called the officials and asked them as to the right of the Tramway Company to be there, and if they were unable to prove that right then he would have proved the negative. He did not prove that, and he made no attempt to do so, and therefore in my opinion the Magistrate was right in his judgment. The appeal must be dismissed.

Mr. Justice Maasdorp concurred.

Mr. Sheil asked for costs.

Mr. Schreiner: By section 37 all fines go for the benefit of the company if the prosecution is at the suit of the company. The police actually prosecuted.

The Court decided to disallow costs, seeing that it was not clear that the prosecution was a private one by the Tramway Company, and not one undertaken by the police.

[Appellant's Attorney, C. C. Silberbauer.]

WAKE V. PEAKE. { 1898. Aug 31st.

Costs —Magistrate's discretion.

This was an appeal from a decision of the Resident Magistrate of Wynberg. The appellant (plaintiff in the Court below) had instituted an action for the recovery of £1 15s., for wagon hire, &c. The Magistrate gave judgment for £1 2s. 6d., which was admitted by the defendant. but not tendered He would not however allow costs to the plaintiff, because he said that the plaintiff's conduct had been arbitrary, and that owing to the arbitrary nature of plaintiff's conduct, costs would not be allowed. Against that decision plaintiff now appealed.

Mr. Benjamin for the plaintiff.

After hearing counsel,

De Villiers, C.J., said: The matter of costs is a matter of judicial discretion. In the present case the Magistrate came to the conclusion that although £1 2s. 6d. was due to the plaintiff, other exorbitant charges were made, and therefore costs should not be allowed. I am not prepared to say that the Magistrate's judicial discretion was improperly exercised, and for this reason the appeal must be dismissed with costs.

Maasdorp, J., concurred.

[Appellant's Attorney, A. Kenealey.]

SUPREME COURT

[Before the Right Hon. Sir J. H. **de Villiers**, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice **Maasdorp**.]

MAGISTRATE'S CASE REVIEWED. } 1898. Sept. 1st.

Mr. Justice Maasdorp said that a case had come before him as judge of the week from the Resident Magistrate of Worcester. A person was charged with theft, and pleading guilty was sentenced to six months imprisonment with hard labour, and on the Tuesday and Wednesday in each week, during the first three months, with spare diet. But where a person was sentenced to a term of imprisonment exceeding three months he could not be sentenced to spare diet. The Magistrate appeared to have thought that by ordering the spare diet during the first three months answered the provisions of the laws. but that was not so, and that part of the sentence must be struck out.

Ex parte SMARTT. { 1898. Sept. 1st.

Franchise and Ballot Act, 1892—Colonial Secretary—Counterfoils of ballot papers—Marked voters' lists—Order of inspection.

It is not competent for the Colonial Secretary to obtain a general order for the opening of sealed packets of counterfoils in his custody, but the parties interested *in the particular election in respect of which it is desired to open any sealed packet, should make the application to the Court.*

This was the petition of the Hon. Thomas Wm. Smartt, in his capacity as Colonial Secretary.

The petition set forth that several applications had been made to the petitioner for inspection of the marked copies of the lists of voters used by the Polling Officers at some of the recent Parliamentary elections, under the provisions of section 62 of the Franchise and Ballot Act, No. 9 of 1892, which provides for the inspection of such documents.

That the marked lists of voters have been sealed up in envelopes together with the counterfoils of the ballot papers by the various Polling Officers whose duty it was to forward same to the Returning Officer under section 49.

That section 61 provides that no person shall, except by order of the Legislative Council, or the House of Assembly, or any Court having cognisance of petitions complaining of undue returns, or undue elections, open the sealed packets of counterfoils after the same have once been sealed up.

The prayer was that the Court might be pleased to grant an order authorising the petitioner, or such other person as the Court might think proper, to open the envelopes containing the counterfoils and marked lists of voters which have been sealed up together as aforesaid.

Mr. Sheil, Q.C., in support of the application referred to sections 49, 58, 61 and 62 of Act 9 of 1892. The practice is to enclose the marked copy of the list of voters in the same packet with the counterfoils. Any person interested may make an application for inspection. Under section 62 the marked copy of the list of voters shall be open to public inspection. The regulations issued under the Act provide for inspection of documents in accordance with section 62 at specified times. (Regulation 3, section (*b*) sub-section 1.)

De Villiers, C.J. said: The 61st section of Act 9 of 1892 provides that "No person shall, except by order of the Legislative Council, or the House of Assembly, or any Court having cognisance of petitions complaining of undue returns or undue elections, open the sealed packet of counterfoils after the same has been once sealed up, or be allowed to inspect any counted ballot papers in the custody of the Colonial Secretary; such order may be made subject to such conditions as to persons, time, place, and mode of opening or inspection as the Council, House, or Court making the order may think expedient." The section clearly contemplates that application will be made to the Court by the parties interested in each particular case for an order authorising the opening of any sealed packet of counterfoils. The 4th sub-section of the 49th section of the Act has been generally understood as requiring that the marked copy of voters' list and counterfoils of ballot papers must be placed in the same packet. It is impossible, therefore, to obtain the marked copies without opening the packet of counterfoils, and in order to open any packet of counterfoils, an order of Court is necessary. It would not be proper to accede to the request of the Colonial Secretary that a general authority should be given him to open the packets at the request of persons interested. The Court alone can judge in each case as to the proper conditions as to persons, time, place and mode of opening and must therefore refuse the general order now applied for.

Maasdorp, J., concurred, and said that his reason for doing so was that the provisions of the section, that there should be certain conditions fixed by the Court under which the envelope could be opened, seemed to contemplate that there might be different conditions in different cases, and that therefore there could not be any general rule laid down applying to all cases. Different persons might be appointed, and special conditions fixed in one case which did not apply to another.

[Applicant's Attorneys, Messrs. J. & H. Reid & Nephew.]

O'BRIEN V. CHRISTIAN AND OTHERS. } 1898. Sept. 1st.

Voters' roll—Revising Court—Divisional Councils Act—Occupier—Manager—Assessment roll—Expunging of name from Roll.

The owner of a farm was enrolled as a voter for members of the Divisional Council under sub-section 1 of section 17 of Act 40 of 1889. His manager and servants lived in separate houses on the farm, which were not valued apart from the farm according to the Assessment Roll, but their names were inserted in the Voters' Roll notwithstanding objections made by the applicant, a duly qualified voter, before the Revising Court.

Held, *that the manager and servants were not occupiers in terms of the second sub-section of the 17th section and that the names had been improperly inserted in the Voters' Roll. The names thus illegally inserted were accordingly ordered to be expunged from the roll.*

This was an application on notice to (1) Owen Smith Christian and eight others, (2) to the Court for the revision of the Voters' Roll for the Divisional Council of Port Elizabeth, and (3) to the Divisional Council of Port Elizabeth, calling upon them to show cause why the names of the first-mentioned respondent should not be expunged from the Voters' Roll of the Divisional Council of Port Elizabeth on the grounds that they were not legally entitled to be there, and that the second-named respondents had acted illegally and with gross irregularity in placing or retaining the said names there.

The affidavit of the applicant alleged that he was a duly qualified voter for the Divisional Council, and that at the sitting of the Revising Court on the 24th June, 1898, he had objected to the names in question being placed or retained upon the Voters' Roll, but that the Court ordered the names to be retained.

The minutes of the Revising Court, annexed to the affidavit, showed that the applicant objected to the name of Owen S. Christian being put on the roll on the ground of his non-residence, and that he was not in occupation of property of the value of £75 in the Assessment Roll in force in the division.

John Farish, called in support of the objection said: I am secretary of the Divisional Council and produce Valuation Roll at present in force. I framed the Voters' Roll in terms of the Act and produce the list. The name of Owen S. Christian appears in the list. His name was inserted as occupier of a house on the farm Goodmansfontein, or better known as Kragga Kamma. The farm is valued at £8,500. It is valued as a whole. Nothing is said about separate valuation of homestead. The farm occupied by O. S. Christian does not appear to be separately valued. I visited the farm. O. S. Christian was not then in the house. I don't know that he went to England in March last, neither do I know that he was not in occupation for over four months. He is not down as a ratepayer for that property.

By Mr. Cox (a member of the Court): At request of owner of the property I placed the name of the occupier on the list. The property is valued at considerably over £75, the portion occupied by O. S. Christian.

Thomas O'Brien said: I am a law agent practising at Port Elizabeth. I know Mr. O. S. Christian and know that he left for England by the Mexican in the early part of March this year: he has not yet returned. I also know that he was not in occupation of the premises when the present Voters' List was framed. I framed the present Voters' Roll: the farm Kragga Kamma is valued as a whole. There is no house or tenement valued at £75 which would entitle him to a vote.

By Mr. Cox: I valued the farm Kragga Kamma as a whole at £8,500.

Henry Bailey Christian said: Owen S. Christian is my son, and has been in occupation of the farm in question for over two years. All his furniture is still in the place. He left for England in April and not in March, and is shortly expected back. The farm Kragga Kamma belonged to two owners, Titterton and myself. Those properties were invariably valued separately. Owen S. Christian occupies the Titterton portion. In my receipt for rates produced Kragga Kamma is shown separately from Goodmansfontein, though the amount is given as a whole. The house was at one time occupied as an hotel, and since my son entered into occupation I spent a considerable sum on it. O. S. Christian lives in the house when he is here.

By Mr. O'Brien: I pay rates on the property, but my son resides on the place and occupies the house. He is in occupation now though he is in England at present. I paid £8,500 for the Titterton portion of the property. He pays no rent but manages the farm.

Mr. O'Brien called attention to Part III. of Act 40 of 1889, section 17.

The Court disallowed the objection,

The objections raised to the names of the other respondents were of a similar nature.

The affidavit of John Farish, secretary to the Port Elizabeth Divisional Council, set forth that the names in question were duly placed upon the Voters' Roll by himself as revising officer in terms of section 19, Part III. of Act 40 of 1889, at the request of the owners of the properties upon which they resided and that he was satisfied that they were each and everyone of them in occupation of immovable property in the district exceeding the limit of value of £75 for each person, and were also in other respects fully eligible.

Mr. Upington appeared for the applicant.

Mr. Innes, Q.C., for the Divisional Council.

The other respondents were in default.

Mr. Upington: H. B. Christian is on the list of voters as owner of this property. O. S. Christian is not liable for rates because the property has not been separately valued. The qualification required by section 17, subsection 2 of Act 40 of 1889, is that he shall be a male person of full age who shall be an occupier, "and shall have been in occupation, for not less than twelve months previous to the date of framing the Voters' Roll, of any immovable property situated within the division and valued according to the Assessment Roll in force in the division at not less than £75." Christian had not actually occupied for twelve months. The other cases are similar to Christian's.

Mr. Innes: I cannot contend that Christian can claim to be registered by virtue of his house, but he is a joint occupier with his father; he manages the farm, and the whole farm is valued at £8,500. H. B. Christian should not be on the roll as owner but as joint occupier with his son.

[De Villiers, C.J.: Can a manager be said to be an occupier?]

Not if he is simply a servant, but he is not apparently in that position. As to the separate valuation, see *Beet* v. *Kimberley Divisional Council* (4 H.C.R., p. 342).

De Villiers, C.J.: The 17th section of the Divisional Councils Act, 1889, enacts that "male persons of full age liable for the payment of Divisional Council rates as owners or lessees under this Act of immovable property within such division which is not in occupation of any occupier entitled to vote under this Act," shall be entitled to have their names placed on the Voters' Roll. By virtue of this enactment the name of Mr. H. B. Christian, the owner of the farm in question, has been duly placed on the Voters' Roll. But in addition to his name the names of several other persons have been placed on the list by virtue of their being said to be occupiers of portions of the same farm in terms of the second part of the 17th section. In one sense no doubt they are occupiers, but the question is whether they are occupiers of property "valued according to the assessment roll in force at not less than seventy-five pounds." The evidence shows that they occupy houses on the farm, but these houses have not been valued according to any valuation roll in existence. One of the occupants is the son of the owner of the farm, and is said to be the manager of the farm, but that fact alone would not entitle him to be placed on the voters' list. As manager, he might be the mere servant of the owner, and as such occupying on the owner's and not on his own behalf. The fact that the owner's name appears on the Voters' Roll under the first part of the 17th section is quite inconsistent with the respondent's claim to appear on the Voters' Roll under the second part of the section. The applicant appeared before the Revising Court and objected to the respondent's names being retained on the roll but his objections were disallowed. He is a voter for the division and his *locus standi* was not objected to. He now applies for an order to expunge the names of the respondents from the Voters' Roll as having been illegally inserted therein. The members of the Revising Court have also been made respondents, and no objection has been made by them or by the other respondents, to the mode of procedure in the present case. They oppose the application on its merits, and contend that the names objected to were properly placed upon the Voters' Roll This contention cannot be maintained, for the simple reason that the persons objected to were not occupiers of property valued according to any assessment roll. The application must therefore be granted, with costs against the respondents other than the members of the Revising Court.

[Applicant's Attorneys, Messrs. Walker & Jacobsohn; Attorneys for the Divisional Council, Messrs. Scanlen & Syfret.]

VAN SCHALKWYK V. PIENAAR'S TRUSTEES.

1898.
Sept. 1st.
" 2nd.
" 3rd.

Insolvent Ordinance 6 of 1843, sections 27, 28—Proof of debt—Magistrate's jurisdiction—Kinderbewys—Compromise—Promissory note—Consideration—Account.

After a proof of debt has been admitted by a Resident Magis-

trate under the 27th section of the Insolvent Ordinance, he has no jurisdiction to reopen such account. Any subsequent statement of account under the 28th section should proceed upon the assumption that the proof was correctly admitted unless it has been rejected by a superior Court.

A person in whose favour a deed of Kinderbewys has been passed in customary form has a preference upon the insolvent estate of a surety, against whom the suretyship debt has been specially registered in the Deeds Office, for the inheritance found to be due by the surviving parent on remarriage. The applicant having proved his debt under a deed of Kinderbewys against the insolvent estate of one of the sureties the proof was admitted by the Magistrate. No application was made by the trustees to a superior Court to reject the proof, but they successfully applied to the Magistrate for a statement of account under the 28th section of the Ordinance. Upon such statement of account the former was reduced from £369 to £40 and a balance found to be due by the applicant to the trustees of £129, whereas in fact he was a preferent creditor for a larger amount. The trustees brought an action against him for such balance, but withdrew it upon his giving them a promissory note for £80 in full satisfaction of their claim.

Held, *in an action brought by them on the note, that the applicant was not debarred from disputing the Magistrate's jurisdiction, in regard to which there had been no dispute and therefore no valid compromise.*

Held, further, *that the withdrawal, under the circumstances, of the suit for £129 by the trustees constituted no valid consideration for the note.*

These were two applications for an amendment of an account made by the minor Rozina Hermina van Schalkwyk through her *curator ad litem*, and by P. J Van Schalkwyk respectively, and an appeal from a decision of the Resident Magistrate of Worcester.

The circumstances which gave rise to the application were the following: On the 15th July, 1882, the parents of the applicants executed a mutual will, by which they appointed the survivor and children sole heirs, with a life interest in favour of the survivor, and further stipulated that in case of the survivor being desirous of entering into a second marriage he or she should execute a "kinderbewys." The immovable property was not to be sold, but was to devolve upon the children in equal shares according to an appraisement by an appraiser appointed by the survivor. The children were not to get transfer until the death of the survivor. The father died in 1885, and the mother, as sole executrix, disposed of the movables and remained in possession of the farm Pienaar's Kloof, which was mortgaged to one Robertson for £1,500. On the 16th September 1885, she filed a liquidation account, on the debit side of which appeared: Debts paid, £2,089 7s. 8d.; and on the credit side the farm Pienaar's Kloof, valued at £2,000: the liquidation account showing a balance for distribution amounting to £2,240.

One of the debts alleged to be paid was the £1,500 mortgage bond and £90 interest, but this was not in fact paid by her, the farm having been subsequently attached by the bondholder and sold for £2,235.

On January 9, 1886, the mother being about to remarry, executed a deed of "kinderbewys," in which she declared the balance of the estate to be £2,240; of this she claimed £1,493 6s. 8d. as her half-share and child's portion, and the share of each of the children £369 12s. One of the sureties to this deed was the insolvent Pienaar, who in the same year married the widow Van Schalkwyk. One of the children, the second-named applicant, became of age in 1886; the other was still a minor.

In 1897 Pienaar became insolvent, and the minor child's claim for £369 12s. was proved in his estate. The second-named applicant proved for £300, £69 12s. having been already paid him on account. A set-off was allowed to the latter claim, and £200 allowed to be proved.

In March, 1898, a special meeting of creditors was held before the Resident Magistrate of Worcester for the purpose of having accounts stated between the insolvent estate and the children. At this meeting the trustees contended that the value of the farm should not have been brought up at all, and that consequently the value of the minors' share should be brought up in the "kinderbewys" at £40 each, and that the insolvent as surety was only liable for this amount. The agent for the children objected that if the value of the farm were deducted from the account the amount of the bond and interest should be deducted from the other side, which would leave the children's share £305 15s. 4d. each. The Magistrate upheld the former contention, and reduced the amount due under the "kinderbewys" to £40 each; this amount was awarded to the minor, for whom a *curator ad litem* had since been appointed by the Court. Against this amount due to the second-named applicant were brought up other amounts due by him to the estate, the result being that he was placed in the account as a debtor to the amount of £129 12s. For this sum he was sued, but, not knowing anything at all of the state of affairs, as he said, and his legal adviser being absent, he had compromised the claim by giving a promissory note for £80 to the trustees, which they had accepted in full settlement. On this promissory note he was sued and judgment given against him by the Resident Magistrate of Worcester.

The Master had made a report upon the matter in which he said, *inter alia*:

The farm Pienaar's Kloof has been sold in execution, and there is a balance of the proceeds of about £500 in favour of the minors to which Mrs. Pienaar, the surviving spouse, has a life interest. This money should be placed with some trust company as the usufructuary is also an insolvent.

If the bond had been paid off out of proceeds of the movables, there could not have been any possible objection to such a course, but it was not done, and there does not appear from the trustee's statement to have been sufficient cash to do so. If my view, which is in accordance with the practice followed here, be the correct one, the insolvent estate of Pienaar would be indebted to the minor Rozina Hermina van Schalkwyk in the sum of £287 2s. as per statement annexed.

Cr.						
By movables ...	£781	10	0			
„ D. T. du Toit, promissory note ...	1,552	10	0			
				2,334	0	0
Dr.						
To costs of administration	4	12	4			
„ debts paid (excluding of course the amount of the bond on the farm which was not paid) ...	589	7	8			
Balance for distribution	1,740	0	0			
				2,334	0	0

The balance of £1,740 would then be divided thus:

Widow's one half ...	870	0	0			
And a child's portion	290	0	0			
To Rozina Hermina van Schalkwyk £290, less succession dues £2 18s.	287	2	0			
„ Joshua Petrus Joubert van Schalkwyk £290, less succession dues £2 18s. ...	287	2	0			
Succession duty ...	5	16	0			
				1,740	0	0

Reconciliation of this amount of £287 2s. due to the minor with amount secured by "kinderbewys" is as follows:

Amount awarded in "kinderbewys"				£369	12	0
Value of farm brought up in Liquidation Account at... ...	2,000	0	0			
Bond thereon (item deducted from both sides of the Liquidation Account	1,500	0	0			
Difference ...	500	0	0			
To which the survivor is entitled to one-half £250, and a child's share £83 6s. 8d.	333	6	8			
And each minor is entitled to £83 6s. 8d.	166	13	4			

Less 16s. 8d., succession dues on £82 10s.	82 10 0
	£287 2 0

Both the applicants now asked that the account and plan of distribution should be amended by awarding to the minor £287 2s. and to the second-named applicant £117 10s., both preferently; the second-named applicant also appealed against the judgment on the promissory note.

Mr. Sheil, Q.C., appeared as the *curator ad litem* of the minor Rozina Hermina van Schalkwyk.

Mr. Schreiner, Q.C., appeared for P. J. van Schalkwyk.

Mr. Innes, Q.C., for the respondents.

Mr. Innes: The mode in which the Master frames the account is not the correct one. The farm was left to the children as a specific bequest; it should not have been brought up in the account as an asset. The estate ought to have paid the bond. If the widow had paid the bond the children would not have been prejudiced. But the sureties to the "kinderbewys" are not liable for the bond not having been paid; they are only there to secure the general inheritance.

[Maasdorp, J.: Should not the "kinderbewys include the farm"?]

The "kinderbewys" is only to secure a certain sum of money. In *Rathfelder* v. *Rathfelder* (1884, p. 9) it was held that the estate ought to discharge the original bond on the property bequeathed. If this were done here only £40 would be due to the heirs. The sureties are there only to see that the properly calculated amounts due to the heirs are paid. They are not liable for the absence of proper conduct on the part of the executors.

Mr. Sheil: A "kinderbewys" is a protection to minors against maladministration by a surviving spouse; if the minors are prejudiced by such maladministration the sureties are liable. *Rathfelder* v. *Rathfelder* was a very special case.

[Maasdorp, J.: How does the farm come under the "kinderbewys"?]

It is brought up in the liquidation account as an asset, and the "kinderbewys" is framed on the liquidation account.

[De Villiers, C.J.: Mr. Innes, is it clear that the "kinderbewys" can be re-opened?]

Mr. Innes: I must admit that the respondents were wrong in their procedure; they should have applied to the Court under section 28 of the Insolvent Ordinance on the ground that the account was wrongly framed and should be set aside. It was a mistake of fact as to figures, and so could be set aside.

Mr. Schreiner: The immovable property was bequeathed to the children according to appraisement. and to devolve upon them after the death of the survivor: it should not be shown in the account at all. Therefore the amount of the bond should also have been taken off. It certainly should not have appeared in the account as it was not paid. The sureties to the "kinderbewys contracted to pay a certain amount; if they had taken action originally, they would have had to show that the bond had been paid. As to the alleged compromise made by P. J. van Schalkwyk the evidence shows that he did not understand the accounts: he was told first that the estate owed him £200, then that the estate owed him £40, and afterwards that he owed the estate £129. *Voet* (2, 15, 23) says that if a compromise has happened by an error of calculation equity demands that the loss should be averted, unless the compromise were as to the error in the calculation itself. We come to the Court by common consent to have the account amended. The incautiousness of the appellant in signing the promissory note can be set against the irregularity of the respondent's action.

Mr. Innes: The Magistrate says in his reasons that he was satisfied that there was no mistake of fact when the appellant signed the note. The compromise was perfectly *bona fide*. The trustees thought that the account was drawn up on a right basis. There was no failure of consideration; no *error calculi* or error of figures, the error was in the legal basis upon which the account was made up.

[De Villiers, C.J.: Was there any dispute between the appellant and the trustees as to the amount due to the estate?]

His agent lodged a protest: a Circuit Court summons for £129 was issued, when a man settles a claim after summons he never is sure of his ground; otherwise he would not settle.

Mr. Schreiner in reply.

Postea (September 2nd and 3rd)

De Villiers, C.J.: In this case it appears that the insolvent's wife, while married in community of property to her former husband, executed a joint will with him whereby the surviving spouse and the children of the marriage were appointed heirs, with the understanding that the survivor should maintain the children until they attained their majority or married. The will also directed that in case the survivor should wish to marry again a deed of "kinderbewys" should first be executed. The immovable property was not to be sold, but was to devolve upon the children on the death of the survivor. The immovable property consisted of the farm Pienaar's Kloof, on which there was a bond of £1,500. After the death of the testator his widow married Pienaar, the present insolvent, after having executed a deed of "kinderbewys" in favour of the two petitioners, who were the children of the former marriage and were still minors. The deed was in the customary form with two sureties, one of them being the present insolvent, and showed a sum of £369 12s. to be due to each of the minors. After the insolvency of Pienaar the petitioners proved their claim against the estate, which was duly allowed by the Magistrate. That proof still stands, and there has been no attempt to set aside the proof in this Court or in any Circuit Court in terms of the 27th section of the Insolvent Ordinance. There was, however, an irregular proceeding before the Magistrate by means of which the former proof of debt was practically reduced from £369 to £40, under the guise of a statement of account in terms of the 28th section of the Ordinance. The first petitioner, who is still a minor, owed no debt to the estate, and therefore the 28th section was wholly inapplicable to her. The second petitioner is now of age and he did owe some debts to the estate, but they ought merely to have been deducted from the proof already allowed by the Magistrate under the 27th section. But by reducing the former proof from £369 to £40 the balance of account was found to be against him. For this balance, amounting to £129, the trustees of the insolvent estate sued him in the Circuit Court, but they withdrew the case upon his giving them a promissory note for £80 in full satisfaction of their claim. This note he failed to pay when due, and he was thereupon sued in the Magistrate's Court for the amount. His defence was want of consideration, inasmuch as the sum of £117 10s. was really owing to him instead of his owing anything to the estate, but judgment was given against him. From this judgment he now appeals

The Court has therefore to deal, firstly with the minor's claim to set aside the illegal restatement of accounts; secondly, with Van Schalkwyk's claim of a like nature, and thirdly, with his appeal against the Magistrate's judgment on the promissory note.

As to the minor's right to relief there can be no doubt whatever. Her proof of debt still stands uncorrected. It has been agreed that her case should be considered as if the present were an application to amend the original proof of debt under the 27th section of the Ordinance. The trustees say that inasmuch as the bond of £1,500 was a debt which the testator's estate was bound to pay for the benefit of the legatees, that amount should have been deducted in order to ascertain the amounts due to the minors. The deed of "kinderbewys," therefore, they say, ought to have shown a balance of £40 due to each instead of £369 12s. But this argument proceeds upon the assumption that the estate did pay the debt of £1,500. In fact, the debt was not paid, although the widow had sufficient funds for the purpose. The result was that the farm had to be sold in execution and a balance of a few hundred pounds is all that remains for the minors instead of an unmortgaged farm appraised at £2,000. A deed of "kinderbewys" is the security given by the surviving parent for the portions of inheritance retained by him or her and belonging to the minor children. The insolvent's wife, as the principal debtor under the deed, was clearly liable to her children for the full amount of the portions due to them out of the assets in her hands. There is no reason in law why her sureties should be entitled to claim a deduction from the minors' shares as if the principal debtor had paid the bond of £1,500. They are entitled, however, to reduce the alleged portion of £369 12s. to the sum of £287 2s. which, according to the Master's report, which the Court fully adopts, is the true portion due to each of the petitioners. The claim of the first petitioner must be allowed with this amendment accordingly. As to the claim of the second petitioner, the debt owing by him to the estate must be deducted from the £287 2s. and his proof of debt for the balance, viz., £117 10s., must be allowed. The Magistrate had no jurisdiction whatever to reopen the proof which had been allowed by him under the 27th section of the Ordinance, and there is no evidence to show that Van Schalkwyk ever consented to such reopening. A question has been raised as to whether the claim of the petitioners against the sureties under the deed is preferent or concurrent. The deed has been duly registered in the Deeds Office, and under the proper heading the sum of £369 12s. is registered as owing by each of the sureties. If this registration is in accordance with the requirements of the law it has the effect of creating a preference. It would appear that until the year, 1840, bonds with suretyship clauses were registered without a special registration as against the sureties, but in that year the practice of such a special registration was adopted. In the case of *In re Kotze* (2 Menz. 67,), decided in 1843, the absence of such special registration was held to exclude the right of preference as against the surety. In the present case the customary form of special registration was adopted. Only one case has been found in the Master's Office where proof has been made against the insolvent estate of a surety under a deed of "kinderbewys," and there the preference was allowed as a matter of course. In that case, as in the present, the sureties had bound themselves in the customary form as co-principal debtors as well as sureties. Due notice having been given to the world of the insolvent's liability under the deed, it is quite in accordance with the usual practice to allow the preference claimed. Coming next to the appeal against the Magistrate's judgment, it would be a strange result if the Court were to uphold the judgment for £80 against the appellant, while the estate really owes him a preferent debt of £117 10s. The Court would have to give effect to such a result, if the transaction between the parties had been a real compromise of a disputed claim. But there appears to have been no dispute whatever as to the Magistrate's jurisdiction to reopen the proof already admitted. The legality of the Magistrate's action was assumed, and therefore the question could not have been present to the minds of the parties whether the applicant was compromising his right to the benefit of the original proof. That right he has not, in my opinion, compromised. If this view be correct then the respondents really owe the appellant the sum of £117, instead of his owing them anything, and the promissory note must be held to have been given without consideration. The appeal must be allowed, and the costs must be paid by the insolvent estate.

[Attorneys for R. H. van Schalkwyk, Messrs. J. & H. Reid & Nephew; Attorney for P. J. van Schalkwyk, V. A. van der Byl; Respondents' Attorney, C. C. Silberbauer.]

ORSMOND AND CO. v. CHRISTIAN AND CO. } 1898. Sept. 1st.

Agent—Principal—Authority.

The defendant in ordering goods from the plaintiffs gave the name of B., *as the person to be charged with the price.* B., *who had not in fact authorized the defendant to act as his agent, repudiated liability. The plaintiffs then attempted to obtain the price from the* T. Co., *for whom the goods had been brought but upon that Company being unable to pay sued the defendant.*

Held, *that he was liable.*

Wright *v.* Williams (8 Juta, 166) *approved.*

This was an appeal from a decision of the Resident Magistrate of Aliwal North, in a case in which the respondents (plaintiffs in the Court below) sued the appellant for the sum of £45 9s. 3d., the purchase price of certain goods sold and delivered by them to him. He tendered £40 0s. 6d. but denied his liability for an item of £5 8s. 9d. for goods sold on October 31. These goods were in fact sold and delivered to Orsmond, but he denied that he ordered the goods for himself, stating that he ordered them for the Aliwal North Threshing Company, of which he was chairman, and that the plaintiffs were aware of that fact. This latter statement was denied by Mr. Hockly, a partner of the plaintiff firm, and Mr. Murray, the traveller who got the order. It was stated by them that Orsmond gave instructions for the goods to be sent to him, and one P. J. Bekker to be debited with the amount. P. J. Bekker repudiated liability, and the account was then sent to H. N. Bekker, and afterwards to the company, but the amount still remaining unpaid, although the company had passed a resolution to the effect that it should be paid, the account was sent to Orsmond. The Magistrate gave judgment for the full amount claimed with costs, and against that judgment Orsmond appealed, The Magistrate attached to his reasons for judgment a statement of facts proved. *Inter alia*, were the following:

That in October, 1895, defendant ordered from plaintiffs certain goods required for the threshing machine owned by the syndicate amounting to the sum of £5 8s. 9d. through plaintiff's traveller, Mr. Murray.

That these goods were supplied by plaintiffs in accordance with the said order and became the property of the Threshing Machine Syndicate.

That the practice of the Machine Syndicate was to appoint annual directors, whose duty it was to order whatever was necessary for keeping the machine in order—that any one of these directors might give the necessary order, and in doing so could make himself responsible to the person supplying the goods, himself recovering from the syndicate.

That the directors appointed for 1895 were Mr. H. N. Bekker, Mr. P. J. de Wet, and Mr. O. F. Henning.

That the goods in question, amounting to £5 8s. 9d., were ordered by Director O. P. Henning—whose order was handed to defendant for completion, who thereafter ordered the goods from plaintiffs.

The Magistrate in his reasons stated further that he accepted the evidence of Mr. Murray, who said that the defendant gave the name of one P. J. Bekker as the person who should be debited with the goods, and the defendant was mistaken in saying that he had told Murray to charge the Threshing Machine Company. He therefore held that as he had not disclosed his principal, he was himself liable for payment of the sum in question.

Mr. Schreiner, Q.C., for the appellant. The goods were ordered by Orsmond as a member of the syndicate. He might be liable as a partner but is not sued as such. In *Collen* v. *Wright* (8 E.B., p. 647) it was held that an action would lie against an agent acting without authority, but here the agent had authority. Bekker could have been called upon to disclose his principal.

Sir H. Juta, Q.C., for the respondents: If Murray's evidence is believed the appellant ordered goods without disclosing his principal. Therefore he is personally liable. *Wright* v. *Williams* (8 Juta, p. 166).

Mr. Schreiner: The Magistrate found that Orsmond ordered for Henning, and Henning was a director of the Threshing Machine Company

De Villiers, C.J.: There is some conflict of evidence in the case. and this Court is in the habit of accepting the Magistrate's decision upon questions of fact, especially where it hinges upon credibility. In this case the Magistrate has found this. He says the plaintiffs deny the statement of the defendant. and say that they were not aware of such a company as the Threshing Machine Company, and that they were treating with the defendant only, who instructed them to invoice the goods to P. J. Bekker, and send them to him (the defendant). The evidence of Mr. Hockly, one of the partners of the firm, is supported by the evidence of Mr. Murray, their traveller. Mr. Murray says the defendant asked him to invoice the goods to P. J. Bekker, and send them to Sauer & Orsmond. It is clear that the defendant gave the name of one Bekker as the person to be debited with the price of the goods. Bekker repudiated liability and no proof was forthcoming that Bekker was the real principal. The rule laid down in *Wright* v. *Williams* (8 Juta, 166) would apply that the defendant as the agent of an alleged principal (Bekker) is liable to the plaintiffs for the price of the goods, But it is urged on behalf of the defendant that the goods were really bought for the Threshing Machine Company and that as the plaintiffs acknowledged the company as their debtors by attempting to obtain the price from the company they can no longer sue the defendant. This contention is unsound, for the simple reason that the defendant's liability if once incurred, could not be discharged by the plaintiffs' attempt to fix the company also with liability. It may well be that the company is liable, but its liability would be concurrent with that of the defendant. The plaintiffs have elected to sue the defendant. He ordered the goods from them and requested them to debit a person who had never authorised him to make the request. The Magistrate therefore properly gave judgment against the defendant and the appeal must be dismissed with costs.

Maasdorp, J., concurred.

[Appellant's Attorneys, Messrs. Sauer & Standen; Respondents' Attorneys, Messrs. Van Zyl & Buissinné.]

PETITION OF MRS. GOULD.

1898.
Sept. 1st.

Mr. McGregor moved for leave to the petitioner to sue *in forma pauperis* in an action about to be instituted by her against her husband. The applicant resided at Willowmore, and not having funds was unable to appear personally in Cape Town when the application was made. Her husband was believed to be living at Heidelberg, in the Transvaal, and in affidavits made by persons there certain allegations were made against him.

The Court referred the case to the Circuit Court at Prince Albert, where petitioner could appear, so that it could be ascertained by the Circuit Judge whether it was a fit case for the granting of the rule asked for.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice MAASDORP.]

Ex parte FAURE AND OTHERS. } 1898. Sept. 2nd.

Parliamentary elections — Ballot — Sealed packet of counterfoils — Marked Voters' Lists — Order to open and inspect.

A defeated candidate at a Parliamentary election may apply without notice for an order authorising the opening of the sealed packet of counterfoils and taking therefrom the marked list of voters for the purpose of inspection.

Upon such an application the Court authorised the Registrar of the Court, after due notice to and in the presence of the petitioner and the successful candidates or their respective agents, to open the sealed packets and counterfoils and take out the marked lists of voters for the inspection of the parties.

It was further ordered that the packet of the counterfoils should be again sealed and handed to the Colonial Secretary for custody and that the marked lists of voters, after being inspected by the parties, be also handed to him for public inspection.

This was the petition of Sir Pieter Faure K.C.M.G., George Morrison Palmer, of Pearson, and Charles Preston Crewe, of East London. The petitioners alleged that they were candidates at the recent Assembly elections, and were taking steps for the purpose of lodging petitions questioning the elections and the returns declared against them.

It was stated that the petitioner Faure stood for the Paarl, Palmer for Somerset East, and Crewe for Aliwal North; that the petitioners had through their attorneys applied to the Colonial Secretary for an opportunity, needed for the purpose of their respective suits, to inspect the marked copies of voters' lists sent by each polling officer in the several electoral divisions contested by them respectively: that they had been informed in reply that as the counterfoils of the ballot papers had been enclosed (whether in separate envelopes or not does not transpire) in the same cover and sealed up with the marked copies of the lists of voters, an application to the Court was required.

The petitioners annexed copies of the correspondence that had passed between their attorneys and the Colonial Office.

The petitioners prayed for an order, subject to such conditions as to persons, time, place, and mode of opening as to the Court might seem proper, authorising the breaking of the seals upon the coverings aforesaid with a view to the separation of the counterfoils from the marked registers in order that inspections might be made on behalf of the petitioners of the said marked copies of the voters' lists.

Mr. Innes, Q.C., was heard in support of the application.

Mr. Sheil, Q.C., appeared for the Colonial Secretary, upon whom notice of the application had been served.

Mr. Innes: It was not the intention of the Legislature in Act 9 of 1892, section 49, sub-section 4, that the marked copies and the counterfoils should be placed in one packet. 35 and 36 Vict. c. 33, section 29, 41 are similar to sections 49 and 61 of that Act. *Stowe* v. *Jolliffe* (9 L.R.C.P., p. 446) is a somewhat similar case to this. It was there held that it was "competent to the Court to grant inspection, and a copy of the marked register of voters upon an affidavit by the agent of a petitioner that, in his judgment and belief, it was requisite for the purposes of the election petitioner," and *semble* that papers should not be sealed in the same packet unless specially ordered. This case was approved in *James and another*, v. *Henderson and another* (30, L. T. p., 527.) It is a question whether or not the application should be *ex parte* or on notice. There are only two English cases I can find reported and in both applications were made after petitions had been filed, notice was there given. *Rogers on the Law of Elections* Part II., p. 687. *Parker on the Powers of Election Agents of Returning Officers*, p. 233. The fact that the list of voters is open to public inspection and that no order would be required if it were not sealed up with the counterfoils is a strong argument that no notice is required.

Mr. Sheil: Section 59, of Act 9 of 1892, makes the Colonial Secretary custodian of all the documents.

De Villiers, C.J.: I was not aware—when the petition of Dr. Smartt was heard yesterday—of the English case of *Stow* v. *Jolliffe*. It is clear from that case that the Court of Common Pleas would have refused the request for a general authority to open sealed packets of counterfoils just as this Court did. An application is now made by a defeated candidate for an order authorising the opening of the sealed packets of counterfoils in terms of the 61st section of the Franchise and Ballot Act, 1892. It is alleged that he is taking steps to lodge a petition for the purpose of questioning the return, and that he is desirous of inspecting the marked lists of voters from the different polling-stations. The marked lists are among the documents which are required by the 62nd section to be open to public inspection, but, as they are in the same sealed packet as the counterfoils, they cannot be taken out without opening the sealed packet of counterfoils. It is clear that a defeated candidate ought to have the opportunity of inspecting the marked lists of voters and the only question is whether he should not first file his election petition, or at all events give notice of his application to the successful candidates. Seeing that the marked lists are intended to be open to public inspection, I am of opinion that an election petition is not necessary, and that the application may be made without notice. Every precaution must, however, be taken to prevent any possible tampering with the documents or with the secrecy of the ballot, and the Court will accordingly authorise the Registrar of the Court to perform the duty He will, after due notice to and in the presence of the parties or their respective agents, open the sealed packets of counterfoils and take out therefrom the marked lists of voters. He will allow the parties to inspect the marked lists and then hand the lists back to the Colonial Secretary for public inspection. As to the packets of counterfoils, he will seal them with the seal of the Supreme Court and hand them back to the Colonial Secretary for further custody.

[Applicants' Attorneys, Messrs. Van Zyl & Buissiné; Attorneys for the Colonial Secretary, Messrs. J. & H Reid & Nephew.]

SAMUELS v. WOOD. { 1898. Sept. 2nd.

Lease—Breach of contract—Damages.

This was an action for £120 damages for breach of contract of lease. The declaration set forth that the defendant agreed to lease to the plaintiff a certain shop in Sir Lowry-road at a monthly rental of £10 for a period of two years. The defendant had not fulfilled his agreement, and plaintiff had had to hire another shop on, it was alleged, an inferior site at a rental of £14 10s. per month. In his plea the defendant denied that he had agreed to lease the shop as stated.

Mr. Benjamin (with whom was Mr. Gardiner) for the plaintiff.

Mr. Schreiner, Q.C. (with whom was Mr. Joubert), for the defendant.

Coenrad Cohen, carrying on business in Cape Town, a brother-in-law of the plaintiff, stated that he negotiated with regard to the lease of certain premises in Sir Lowry-road. He saw Mr. Wood, and asked if he would lease one of his shops, then in course of erection, to plaintiff, and Mr. Wood asked witness if he would sell him two stores adjoining his place in Leeuwen-street. Plaintiff was present at that meeting. Nothing definite was done, and they arranged to meet Mr. Wood at the premises in Sir Lowry-road. That meeting took place later on. There were present witness, Mr. Wood, and plaintiff. Mr. Wood asked witness about selling the stores, and he said he would not take less than £900. Mr.

Wood said that if witness would take £850 he would give plaintiff the lease of the shop for two years at £10 per month. Witness said he would take £850 if Mr. Wood would let his brother-in-law have the lease of the shop for five years at £10 per month. Mr. Wood would not make the term of the lease more than two years, and at last witness said, "All right, I will take it." Witness handed over the keys of the premises in Leeuwen-street, and had given up occupation ever since. He did not think Mr. Wood had taken transfer yet. Witness knew nothing about a company. After the conversation at Sir Lowry-road, Mr. Wood called Mr. Cowling, and told him to make the shop ready for Mr. Samuels. Mr. Cowling said he would be able to get the shop ready in a month. He gave witness an envelope, and told witness to go to Mr. Steer, and tell him to draw up a lease. Nothing was said to witness about any company to whose consent the lease would be subject. Plaintiff had not got possession of the shop. (Letters were put in from Messrs. Steer & Co. to defendant, requesting the latter to call and confirm the lease and sign the same.) The shop plaintiff now occupied was not in as good a position as the shop of which he claimed the lease. He could not fix the exact date when the agreement was made, but it was about the middle of February. It was on the same day that he received the envelope. (The envelope was put in. It contained nothing with regard to the lease, only referring to the sale of the premises by Cohen to Wood for £850. The date on it was February 14.)

Cross-examined: Witness did not know as far back as January last that Mr. Wood's business was going to be floated into a company. Witness was responsible for the debts contracted by Samuels in his business.

Re-examined: The shop occupied at present was a corner shop. One side was in Leeuwen-street, a small street, in which only Kafirs lived.

Letters were put in to show that for some time before Mr. Wood purchased the stores in Leeuwen-street from Mr. Cohen, the latter had been negotiating for their sale.

Benjamin Samuels, clothier, Sir Lowry-road, the plaintiff in the action, corroborated the evidence of the previous witness as to the interview with Mr. Wood and the agreement to lease the shop in Sir Lowry-road to witness. He did not see the envelope given to Mr. Cohen.

Cross-examined: He had never heard a word about a company being floated at the time the agreement was entered into, and nothing was said about the sanction of the directors of the company being needed. Mr. Cohen backed witness financially, but did not share in the profits of the business. Witness sometimes bought goods from Mr. Cohen.

William Cowling, a contractor, stated that he was engaged by defendant to complete the shops in Sir Lowry-road. He remembered the plaintiff, defendant, and Mr. Cohen being together on a certain day last February at the place where the building was going on. Witness was called, and Mr. Wood asked him how long it would take to complete the shop, and he replied in about four weeks' time. Mr. Wood then said, "All right; get along with it," or words to that effect. Nothing was said in his presence at that time about the lease. He knew some arrangements were in hand about leasing that shop, but he could not go so far as to say anything definite was said about the lease. When he was instructed to proceed with the shop he naturally inferred that the agreement had been completed. Leeuwen-street was a very important street. The contract for building those premises was between witness and defendant.

Cross-examined: Witness knew of the existence of a company. He knew of the matter when it was broached, before the plans were made for the premises. Witness's opinion was that the premises plaintiff now occupied were on a better site than the one in dispute. He was of opinion that plaintiff was better off in the premises he now occupied, even at a higher rental. Plaintiff and Mr. Cohen must have heard about the company. He thought he must have told them, but he could not say positively that he did so.

Re-examined: Witness had never been engaged in a clothier's business, but as a contractor and valuer of buildings he would say the site presently occupied by plaintiff was more valuable than the one of which the lease was claimed.

This closed the case for the plaintiff.

John Henry Wood, the defendant, said he formerly carried on business as a miller and corn merchant. He purchased the property in Sir Lowry-road in December, 1896, and commenced building the new mill there in June, 1897, and there was then an idea of floating the business into a company. The date when he met plaintiff and Cohen was February 7. In the morning previous to that they met him at his place of business, in Plein-street, about the purchase of the stores in Leeuwen-street. The matter of hiring one of the shops witness was building was also mentioned. An appointment was made, and he met plaintiff and Cohen in the afternoon at the premises in Sir Lowry-road. Witness would not give a decided answer about letting the shop. They asked for the lease for two years, but nothing was said about five years. Witness told them about the company, which there was a probability would go through, and said he could not let the premises without the sanction of the directors. Nothing was said about his getting Cohen's property for £850 if he would lease plaintiff the shop for two years. They pressed him to buy the property, but he declined at first, and then they gave him a week to consider. It was absolutely false that he handed the envelope to Cohen that day. He gave him that envelope a week later. On March 8 he received a letter from Messrs. Steer, requesting him to call and confirm the lease, which was awaiting his signature. He at once called upon Messrs. Steer and repudiated the lease. The company had actually been floated and registered.

H. A. Bidewell-Edwards, broker and land agent, deposed that he had inspected the shop, a lease of which the plaintiff claimed, and also the shop plaintiff now occupied. He was of opinion that for a clothier's business the shop plaintiff now occupied was much more valuable than the other, and worth £3 or £4 a month more.

Robert Alfred McIntyre, defendant's attorney, said he was a director of the company now owning the mills in Sir Lowry-road. He first heard of the intention to float the business into a company about December last.

This closed the case for the defendant.

After hearing Mr. Benjamin,

De Villiers, C.J. said: It is not necessary to hear Mr. Schreiner in this case, because the Court has repeatedly expressed itself of opinion that all contracts of sale or lease ought to be in writing. Of course, it is competent to prove a verbal agreement of lease, but in such cases the Court has always held that it should be proved as clearly as possible, and that where there was any doubt it should be given in favour of the defendant and not the plaintiff. Now, in this case there must be a great doubt as to whether there was a binding contract. I do not think there is sufficient evidence that there was a binding contract. I thought that an independent witness like Mr. Cowling would have assisted the Court, because he was present at the interview, and he was not interested in the matter. He was called on behalf of the plaintiff, but all he could say was that he was asked to finish the shop as soon as possible, or words to that effect, but there was nothing to justify him in saying that the lease had been agreed upon. Another point in the case is this. It is quite true, according to Mr. Cohen's evidence, that he was not very eager to sell the houses, but he was really very eager to enter into a lease on behalf of his brother-in-law. But when he got the document regarding the sale, why did he not insist upon the lease being referred to in it? I should have thought that if he was eager to get the lease he would have asked Mr. Wood to add a few words with regard to the lease, and then there would have been something to go upon. This took place on February 14, and it was not until March 8 that Mr. Wood was requested to sign the lease. On that day he received a letter from Messrs. Steer asking him to do so, but he refused. Under these circumstances, as the plaintiff has not clearly established his case, I think there should be absolution from the instance, with costs.

Maasdorp, J., concurred.

[Plaintiff's Attorney, A. Steer; Defendant's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

IN THE MATTER OF ARTHUR JAMES FIELD. { 1898. Sept. 2nd.

Mr. Benjamin applied for an order declaring Arthur Field James of unsound mind, for the appointment of a *curator bonis*, and for costs. The affidavits showed that James, who is now in the Natal Government Asylum, had become of unsound mind through excessive drinking.

The Court granted the order, and appointed Mr. Jones, of Messrs. Jones & Walker, Kokstad, curator of the property; costs to come out of the estate.

SUPREME COURT

[Before the Right Hon. **Sir J. H. de Villiers**, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice **Maasdorp**.]

Ex parte JUTA. 1898. Sept. 3rd.

This was an application by Sir Henry Juta, who was a candidate at the last election for the House of Assembly, for an order similar to that granted in the case of *Faure and Others* (*supra*, p.).

Mr. Innes appeared for the applicant.

The order was granted.

WOLFF, N.O. V. SOLOMON. 1898. Sept. 3rd. „ 12th.

Res judicata—Plea of *lis alibi pendens* — Foreign judgment — Foreign suit.

The fact that a suit has been commenced by a plaintiff and is still pending in the Court of a foreign State having jurisdiction over the defendant, affords prima facie *a good ground for a plea in abatement to an action instituted in the Supreme Court of this colony by the same plaintiff against the same defendant for the same thing, and arising out of the same cause, in the absence of proof that justice would not be done without the double remedy.*

This was an argument on an exception to the defendant's special plea in abatement.

The plaintiff's declaration was in the following terms:

1. The plaintiff resides at Wynberg; the defendant is resident at Johannesburg, in the South African Republic.

2. In or about the month of March, 1888, the plaintiff and defendant entered into partnership at Johannesburg aforesaid as brokers and dealers in mining property, under the style or firm of Victor Wolff & Co.

3. The business of the said firm was carried on at Johannesburg from the said month of March, 1888, up to the date of dissolution of partnership hereafter referred to. But at the end of the year 1889 it was arranged that the said firm should also carry on business in this colony, and the defendant about the said time proceeded to Kimberley, where he resided for some considerable time, and transacted a large amount of business, on account of and with the money of the said partnership, by buying and selling shares and otherwise.

4. The defendant thereafter similarly carried on business at Cape Town on account of the said partnership; the firm's business at Johannesburg was in the meanwhile conducted by and under the supervision of the plaintiff.

5. On or about the 20th October, 1890, the plaintiff and defendant agreed to terminate their said contract of partnership, and it was arranged between them that the plaintiff should be appointed the liquidator of the firm's business and assets, and the defendant agreed to confer and did confer on him all necessary power in that behalf.

6. The plaintiff has duly performed his duty as such liquidator and has duly examined the books of account, vouchers, and other documents belonging to the partnership at his disposal. After giving credit to the defendant for all his share of the profits of the said partnership there is still due and owing by him in respect of his private account, to the plaintiff as liquidator of the said firm the sum of £3,968 16s. 7d. The plaintiff annexes hereto a memorandum showing particulars of the said balance marked A.

7. At divers times between the month of November, 1888, and the date of dissolution aforesaid, the defendant drew large sums of money on the firm's account, which money was the property of the said partnership. And he also realised and disposed of a large number of shares belonging to the partnership.

8. The defendant has not duly accounted for the moneys so drawn and for the proceeds of the shares so disposed of. The plaintiff attaches hereto a memorandum marked B, showing particulars of certain such transactions as aforesaid, in respect of which a balance of £16,758 4s. 10d. has not been duly accounted for by the defendant.

9. All things have happened, all conditions been fulfilled, and all times elapsed to entitle the plaintiff to be paid the sum of £3,968 16s. 7d. as aforesaid, with interest from the 20th October, 1890, and to entitle the plaintiff to claim from the defendant a full account of the manner in which he has

dealt with the said sum of £16,758 4s. 10d., yet the defendant refuses to pay the said sum or to render the said account.

10. In or about the month of May, 1898, the plaintiff arrested the defendant in Cape Town, in order to be in a position to institute this action. On the 26th May, this Honourable Court discharged the said arrest, but by consent of parties the said defendant was ordered to find certain security to abide the judgment of this Honourable Court in respect of the matter now sued upon.

The plaintiff claims: (*a*) Payment of the sum of £3,968 16s. 7d., with interest from 20th October, 1893. (*b*) An order compelling the defendant to render a due and properly vouchered account of his dealings with regard to the balance of £16,758 4s. 10d. hereinafter referred to, and to pay such sum as may upon debate of the account be found to be due. (*c*) Alternative relief. (*d*) Costs of suit.

The defendant filed the following plea in abatement:

1. In the year 1893 he, as plaintiff, instituted a certain action in the High Court of the South African Republic against the said Victor Wolff in his capacity as liquidator of the said firm of Victor Wolff & Co., wherein he, then plaintiff, prayed for an order compelling the said Victor Wolff to file an account of his liquidation of the estate and assets of the said firm, and to pay to him, the plaintiff, the amount found due to him at foot of the said account after due debate.

2. The said Victor Wolff in the said action claimed from the present defendant, then plaintiff, an account of his administration of the affairs of the firm while conducting a branch of the firm's business at Kimberley, which branch had in February, 1889, been finally closed, and of which all the books, documents, and vouchers had been sent to the present plaintiff at Johannesburg, the principal place of business of the firm, and also a similar account of the operations of the defendant, then plaintiff, on behalf of the firm at Cape Town and in England, all which operations were merely subsidiary to the principal business at Johannesburg.

3. The defendant annexes hereto marked A true translations of the pleadings in the said action, and craves leave to refer this Honourable Court thereto.

4. The matters in dispute in the said action were referred by order of the said High Court, dated the 28th day of November, 1893, to certain arbitrators who accepted the office of arbitrators therein and acted in the dispute between the parties and on the 25th day of April, 1894, they made their award therein.

5. True translations of the said order of Court and award are hereunto annexed and marked B and C respectively.

6. By subsequent order of the said High Court, dated the 1st October, 1896, the said award was made a rule of the said Court, and a true translation of the said order is hereunto annexed and marked D.

7. True translations are also hereunto annexed and marked E, F, G, of further orders of the High Court of date the 26th February, 1897, the 24th June, 1897, and the 19th November, 1897, to which, and especially the latter the defendant begs to refer this Honourable Court.

8. Thereafter on the 25th day of February, 1898, the said High Court made a further order, true translation whereof is hereunto annexed and marked H, directing a report to be given by one Aiken, the plaintiff's accountant, whether it were possible to draw up a statement of account of the Kimberley business of the said firm from the books in his control.

9. In compliance with the said order, the said Aiken presented the report, a true translation whereof is hereunto annexed and marked I.

10. Thereupon the said High Court, on the 13th day of April, 1898, made an order, true translation whereof is hereunto annexed and marked J, cancelling the aforesaid previous order, of date the 19th day of November, 1897, whereby the present defendant, plaintiff in the original suit, had been ordered to furnish a statement of account in accordance with the award of the arbitrators.

11. The aforesaid order of the said High Court, of date the 1st day of October, 1896, whereby the said award of arbitrators was made a rule of the said Court, and the defendant, now plaintiff, was ordered to file a satisfactory liquidation account, has never been complied with by the defendant in that suit, now the plaintiff, who remains in default and disobedience of the lawful order of the said High Court.

12. All the matters now raised by the plaintiff in this action are still matters *sub judice* in the said High Court, which is a Court of competent jurisdiction, and in which the said suit was instituted and is still pending, and the defendant submits

that by reason of the premises the plea of *lis alibi pendens* is a good plea to the plaintiff's declaration, and that he is not entitled to have and maintain this action in this Honourable Court.

13. Or in the alternative, defendant submits that by reason of the premises the plea of *res judicata* is a good plea to the prayers of the plaintiff's declaration in this suit.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

The plaintiff excepted that the above plea was bad in law.

Mr. Innes, Q.C. (with him Mr. Close), for the plaintiff.

Mr. Schreiner, Q.C. (with him Mr. McGregor), for the defendant.

Mr. Innes: I admit that the claim which we now make covers the claim made in the High Court of the Transvaal but our demand is a larger demand and is in a different form; it includes an amount of £3,968 in respect of the defendant's private account; the order of the High Court had reference to dealings at Kimberley; we are now asking for an account of the dealings in Cape Town also.

[De Villiers, C.J.: Was not the claim in reconvention as wide as the present claim in convention?]

Yes, but a different order is asked for The requisites of a plea of *lis alibi pendens* are the same as those of a plea of *res judicata*. *Voet* (44, 2, 7). The demand, therefore, must be between the same persons, for the same thing and arising out of the same cause of action. *Bertram* v. *Wood* (10 Juta, p. 177). We are now demanding a payment out of private estate, and an account not of the Kimberley business alone but of all dealings in Cape Town, the sale of shares, &c., since the commencement of the firm. The judgment is a foreign judgment. As to *lis pendens* in a foreign country, *Westlake on Private International Law* (section 338). The difference between our procedure and the English procedure seems to be this that here if the Court is of opinion that the plea of *lis pendens* is good it is a dilatory exception: in England the plaintiff is put to his election as to whether he will go on with his action in the foreign country or here. The fact looked to is the same, viz.: whether the double litigation is vexatious and harassing. *Cox* v. *Mitchell* (29 L.J. (N.S.), C.P., p. 33). *McHenry* v. *Lewis* (22 Ch. D., p. 397) is a leading case on the question. It was pointed out by Jessel, M.R., that the remedy of the procedure might be different in different countries. In this very matter the remedies are different, here we have a special security of £4,000; there we have not that but may have some other security. *Peruvian Guano Company* v. *Bockwoldt* (23 Ch.D., p. 225: per Jessel, M.R., at p. 230); *Hyman* v. *Helm* (24 Ch. D., p. 531). The double proceedings in this matter are not vexatious. There is no *res judicata* inasmuch as there has been no final judgment as yet delivered in the Transvaal

Mr. Schreiner: This suit is either *lis alibi pendens* or it is *res judicata*. If the order that the plaintiff shall render an account stands it is *res judicata*; if that order has been cancelled it is *lis alibi pendens*. *Burge's Colonial Laws* (Vol. 3, p. 1,038) quoting *Digest* (44, 2, 12, 13, 14). This case is partly *res judicata* and partly *lis alibi pendens*.

[De Villiers, C.J.: Is *lis alibi pendens* an absolute bar?]

I can find no authority for that, but *Voet* treats of it in the same way as *res judicata*. *Booth* v. *Leycester* (1 Keen, p. 579); *Cox* v. *Mitchell* was a very peculiar case, the American remedy was lost through coming to England. In the present case Wolff still has his remedy in the Transvaal. *Law* v. *Garrett* (8 Ch.D., p. 56); as to *res judicata*, *Bertram* v. *Wood* (10 Juta, p 177); *The Lanarkshire* (2 Spinks, p. 189); *O'Shea* v. *Le Page* (2 De G., M. and G., p. 892): *Mutrie* v. *Binney* (35 Ch.D., p. 614); *Henderson* v. *Henderson* (3 Hare, p. 100); *Pigott on Foreign Judgments* (p. 32 and pp. 64, 75); *Nelson's Private International Law* (pp. 338, 375); *Storey's Conflict of Laws* (subsections 598, 600); *Bushby* v. *Munday* (5 Maddock, p. 297). The suit is inconvenient, vexatious, and delayed.

Mr. Innes: *Bertram* v. *Wood* assumes a final judgment having been given. There is none such here. On the plea of *lis pendens* the onus is on the defendant to show that vexation and inconvenience are caused. The proceedings in the Transvaal have now become so complicated that it is more convenient to go into the whole matter here.

Postea (September 12th).

De Villiers, C.J: In March, 1888, the plaintiff and defendant entered into partnership at Johannesburg as brokers and dealers in mining property under the style of Victor Wolff & Co. At the end of 1889, they agreed to carry on their business in this colony also, and the defendant proceeded to

Kimberley and afterwards to Cape Town, at both which places he carried on business on behalf of the firm. In the meantime the business at Johannesburg was carried on under the supervision of the plaintiff. In October, 1890, the parties agreed to terminate their partnership and appointed the plaintiff as the liquidator of the firm's business and assets, In July, 1893, the defendant instituted an action against the plaintiff in the High Court of the Transvaal for an account of the plaintiff's administration as liquidator and for payment of such amount as should be found due to the defendant. The defence was that it was impossible for the plaintiff to render a proper account until the defendant had rendered an account of his administration. There was also a claim in reconvention by which the plaintiff claimed a proper statement and account of all the defendant's dealing as manager of the business at Kimberley and Cape Town. and a debate of such account. In November, 1893, the High Court asked, by consent of the parties, that the case be referred to two arbitrators, and that the cost of the action should depend upon the question whether the plaintiff could and was bound to furnish an account. In April, 1894, the arbitrators awarded that the plaintiff could and must hand in a liquidation account, but that the defendant should also hand in his account, and that each party should bear his own costs of the action. Some further interlocutory proceedings took place, and in November, 1897, the High Court ordered the defendant to frame an account in terms of the award, and ordered the plaintiff to give to the defendant all books in the possession of the former. The defendant appears to have found it impossible to draw up an account from these books, and in February, 1898, the High Court appointed a Mr. Aiken to report to the Court whether it was impossible for the defendant to make up a statement of account from the books in question. In March Mr. Aiken reported that the books were insufficient for the purpose, and accordingly in April, 1898, the High Court ordered that its previous order of November, 1897, as to the framing of an account in connection with the Kimberley business be cancelled. Thus matters stood between the parties when in May, 1898, the defendant came to Cape Town on a visit, and was arrested at the suit of the plaintiff for a large debt alleged to be due to the latter. The defendant was released by order of this Court on giving due security, and the plaintiff instituted the present action. By way of statement of this action the defendant has pleaded that the matters now raised by the plaintiff were raised in the suit which is still pending in the Transvaal Court, and that the plea of *lis alibi pendens*, or in the alternative the plea of *res judicata*, is a good answer to the plaintiff's present demand. After carefully reading the pleadings in the two actions the Court is satisfied that the cause of action is the same and that the claim which is made in the present action is substantially the same as that which was made by the plaintiff in his claim in reconvention in the High Court. The claim is now worded in a slightly different manner and it is a little more specific, but it would have been impossible for the High Court to decide upon the claim before it without deciding upon the very matters which this Court is now asked to decide upon. If the High Court had pronounced a final judgment upon the claim in reconvention such judgment could have been accepted as *res judicata* in this Court. The parties were the same, the cause of action was the same, and the thing claimed was in substance the same. Not only was the defendant domiciled in the Transvaal but he appeared to defend the claim in reconvention and no question therefore arises as to the jurisdiction of the High Court to adjudge the matters in dispute between the parties. A final judgment of the High Court therefore would have been pleadable as *res judicata* in the present action.

The judgment, however, was not final, because if the plaintiff should furnish sufficient books and documents it will still be competent for the High Court to order the defendant to frame an account therefrom. The litigation is still pending, and the question is whether the plea of *lis pendens* is a sufficient answer to the present action. The requisites of a plea of *lis alibi pendens* are stated by *Voet* (44, 2, 7) to be the same, in regard to the person, cause of action and thing claimed, as those of a plea of *res judicata*. He does not however touch upon the question whether, in the case of foreign litigation, a greater discretion should be allowed to the Court in regard to suits still pending in foreign Courts than in regard to suits finally concluded in such foreign Courts. For myself I am not prepared to say that the plea of *lis pendens* in a foreign State would be a good defence in every case in which the plea of *res judicata* in such foreign State would have been a good answer. But I do hold that the fact that a suit has been commenced by a plaintiff and is still pending in the Court of a foreign State having jurisdiction over the defendant affords, *prima facie*, a good ground for a plea in abatement to an action instituted in this court by the same plaintiff against the same defendant for the same thing, and arising out of the same cause, in the absence of proof that justice would not be done without the double remedy. In the present case there is no replication and no proof to that effect. On the contrary, it would be extremely inconvenient for this Court to take up the litigation at the point where the High Court has left it. If both parties are anxious to bring the litigation to a close, there is no reason whatever why the High Court should not finally decide the matters at issue between them. The exception to the defendant's plea in abatement must therefore be overruled, with costs.

[Plaintiff's Attorney, G. Trollip; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice).

PROVISIONAL ROLL.

TREDGOLD V. VAN RHYN. { 1898. Sept. 12th.

Mr. Close applied for the final adjudication of the defendant's estate.

STANDARD BANK V. DU PLOOI AND OTHERS.

Mr. P. Jones applied for provisional sentence for £538 10s. due on a promissory notice.

Order granted subject to the production of the Master's certificate.

THE MASTER V. THOS. KING AND ARTHUR HENRY WILEY.

Mr. Sheil, Q.C., moved for an order calling upon the defendants to file an account.

Granted.

HANSEN V. CARDINAL.

Mr. Benjamin applied for provisional sentence on certain conditions of sale for £1,800, being the purchase price of certain landed property and furniture.

Granted.

HALL V. CARELSON.

Mr. Upington asked for provisional sentence on a mortgage bond, which had become due from non-payment of interest.

Granted.

ROSS AND CO. V. DAY.

Mr. Benjamin asked for judgment for £42 10s. 4d., being the balance of the purchase price of certain goods sold and delivered.

Granted.

ADMISSIONS.

The following admissions were made:

Jacobus Lodiwicus Maritz Goedhals as attorney and notary.

Wilhelmus Lodewicus Fourie Schutz as attorney and notary.

Marius Toger Flemmer as attorney and notary.

John Frederick Ernst Bernard as attorney and notary.

Abraham Matthys Johannes de Villiers as translator.

REHABILITATIONS.

Casper Jan Hendrik van der Walt, Johann Adam du Preez, Michael Johannes Moller, and Leopold James Braude were rehabilitated.

GENERAL MOTIONS.

THE TORVA EXPLORING SYNDICATE V. FOLEY.

Mr. Schreiner, Q.C., appeared for the appellant, and applied for leave to appeal to Her Majesty in her Privy Council. Counsel stated that the application was similar to several others which had been granted by the Court.

Granted.

THE OLIFANTS VLEI GOLD-MINING COMPANY V. WOLFF AND CO.

This was an application for an order declaring the property of Victor Wolff executable for the amount of the judgment obtained by the plaintiff against him as liquidator of the firm of Victor Wolff & Co.

This judgment was granted on the 18th August last, in the form of provisional sentence upon a judgment of the High Court of the South African Republic.

Mr. Schreiner, Q.C., appeared for the applicant.

Mr. Close for the respondent.

After argument, the case was ordered to stand over for the production of the pleadings in the Transvaal suit.

Postea (November 1st).

The pleadings in the Transvaal suit were produced.

Mr. McGregor, for the applicant: The declaration in the High Court shows that Wolff, N.O., was the liquidating partner of Victor Wolff & Co., and sued as such: his private estate is therefore liable. *Simpson* v. *Fleck* (3 M., p. 217). He sued as liquidator and a compromise was arrived at. He acted as agent for the partnership; the judgment is therefore a judgment against the partnership and consequently he is himself liable.

Mr. Close, for the respondent: The matter stood over only to see whether Wolff acted individually or N.O. in the Transvaal Court. There is no proof before the Court of the law of partnership in the Transvaal or of the position of the liquidator.

Mr. McGregor in reply.

De Villiers, C.J.: It is quite true, as Mr. Close urges, that when judgment was given by this Court upon the Transvaal judgment the Court refused to make the judgment against Wolff individually. At the time the Court had not all the facts before it, and even if it had I am not sure that it would have done so. In the Transvaal Court the judgment was given against Victor Wolff, N.O. Now what was his capacity? His capacity was liquidating partner of the firm of Victor Wolff & Co., and in that capacity he brought an action in the Transvaal. A compromise ensued, and ultimately judgment was given against Victor Wolff, N.O., for a certain amount of costs. That judgment was confirmed by a judgment of this Court. Now supposing there had been a judgment before Victor Wolff was made liquidator, it would have been a judgment against partners. There can be no doubt that the Court would have enforced that judgment as against the individual partners. The fact that Victor Wolff was sued, or did sue N.O., did not, in my opinion, affect the question upon the fact that this was an action brought on behalf of the partnership, brought by Victor Wolff himself. In my opinion the principle which underlies judgment against a partnership should be applied in this case. In the present case the judgment was a judgment made against the partnership of which Victor Wolff was a member. Accordingly the order must be granted, with costs.

[Applicant's Attorney, Gus Trollip; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

IN THE MATTER OF THE PETITION OF JOHN GIBB AND EMILY GIBB, BORN WRIGHT.

Mr. Close applied for leave to the parties to enter into a post-nuptial contract.

The application was granted.

DE VILLIERS V. DE VILLIERS.

Mr. Benjamin applied for a decree of divorce on the ground that the defendant had not obeyed the order of the Court for restitution.

The application was granted.

METCALFE V. METCALFE.

Mr. Benjamin applied for leave to the applicant to sue for restitution of conjugal rights by edictal citation, and stated that the applicant had been deserted by her husband, who had sailed by the ship Earl's Court for Australian ports.

The application was granted, and the order made returnable on February 1.

IN THE MATTER OF THE FREE STATE PROSPECTING SYNDICATE, LIMITED, IN LIQUIDATION.

Mr. Close applied for the confirmation of the liquidator's report.

The application was granted, and Mr. Trollip was appointed attorney to the liquidator. The authorised remuneration of the directors was fixed at the rate of 5 per cent. on the assets realised.

IN THE ESTATE OF THE LATE SIR HENRY MITCHELL.

Mr. Benjamin applied for an order authorising the Master to issue letters of administration to Gustavus Trollip, erroneously styled George Trollip in the will of the testator.

The application was granted.

IN THE MATTER OF THE PETITION OF STEPHEN BAZ.

Mr. Close applied for a rule *nisi* under the Derelict Lands Act to be made absolute.

The application was granted.

IN THE MATTER OF THE PETITION OF HEINRICH ADAM BIESEL.

Mr. Benjamin applied for leave to alienate or mortgage certain property which had been transferred to the applicant and the other heirs of his father Friedrich Biesel, subject to the terms of the will of the said Friedrich Biesel. The will contained a restriction against alienation or mortgage during the life of the applicant but authorised alienation by last will. The Registrar had refused to register any alienation.

Mr. Benjamin: The restriction is a nude prohibition. A simple restraint on alienation without declaring in whose favour it is made is void (G. 2, 20, 11): *Re Carey* (11 Juta, p. 123): *Lind* v. *Calitz* (9 Juta, p. 268).

[De Villiers, C.J.: In those cases the *dominium* was bequeathed subject to a restriction as to alienation during life, but here nothing more than the usufruct is bequeathed.]

I contend that reading the will as a whole, the word "use" must be taken to have been meant to convey the *dominium*.

The application was refused.

[Applicant's Attorney, C. W. Herold.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice).]

REGINA V. MYLES AND GLEESON. } 1898. Sept. 13th.

This was an appeal against the conviction and sentence passed upon the appellants by the Assistant Resident Magistrate of Cape Town.

The appellants were charged with the crimes of fowl-house breaking with intent to steal and theft, in that upon or about the 23rd July, 1898, they did wrongfully and unlawfully break and enter the fowl-house of James Glynn, of 40, Canterbury-street, and did steal three fowls, his property. The evidence for the prosecution went to show that on the night of the theft, about 10.45, the two appellants, who lived in a house in Mr. Glynn's yard, were seen coming from the direction of the fowl-house, Myles carrying a white bundle in his right hand. After they got outside a white bundle was found near a spot close to which Myles had been standing. This bundle consisted of a shirt, identified as the property of Myles, containing three of Mr. Glynn's fowls, the fowls being dead but still warm.

For the defence five soldiers were called, who swore that the prisoners were in their company on the night of the theft, and that they left them in the Clyde Hotel at 10.30 p.m.

The prisoners were found guilty, and sentenced to three months' imprisonment with hard labour.

From this sentence they now appealed.

The prisoners were heard in person.

Mr. Sheil, Q.C., for the Crown.

De Villiers, C.J., asked Myles why he appealed.

Myles replied that he was not guilty, and was not at the place where the theft took place at the time stated. He was in the Clyde Hotel.

De Villiers, C.J., said the Magistrate believed the evidence of Hendricks and Sarah Russell, who said they saw the prisoners there.

Myles said he had had a dispute about a woman with Glynn, who had promised to "fix" him for it. The shirt in which the hens were found was not his. He left the Clyde Hotel at eleven o'clock, and it would take a quarter of an hour to walk to Canterbury-street. He hoped his lordship would take into consideration the fact that he had been in prison for two months.

Gleeson also said he was not guilty, and he did not see why they should be convicted. They were imprisoned for other people's crime.

De Villiers, C.J., said if the soldiers were right in their evidence it would be difficult to hold that the prisoners could be the thieves.

Mr. Sheil replied that the Magistrate disbelieved their evidence. It was inconceivable that both Miss Russell and Hendricks could have mistaken the two prisoners whom they knew well and actually saw leaving the yard. The soldiers had been drinking freely, and their evidence was rightly rejected by the Magistrate.

De Villiers, C.J.: I am afraid we must dismiss the appeal. The question is one of credibility, and the Magistrate believed the witnesses for the prosecution, who were positive that the prisoners were present when the theft was committed. If these witnesses spoke the truth it is quite clear that the prisoners are guilty. The Magistrate was enabled to test the credibility of the evidence, and it would be very difficult for us sitting in appeal to reverse that decision on a mere question of fact. The appeal must be dismissed.

IN THE ESTATE OF THE LATE GEORGE FREDERICK NICOLAS WALDEK.

Mr. Benjamin asked for leave to sell certain property.

An order was granted in terms of the Master's report.

IN THE ESTATE OF THE LATE PHILIP RUDOLPH BOTHA AND PETRUS JOHANNES FOURIE.

Mr. Innes, Q.C., applied for an order for the transfer of certain property. The matter had been before the Court upon the 13th July (p. *supra*) and was referred to the Resident Magistrate of Somerset East for his report. The Resident Magistrate had since reported in favour of the proposed scheme of subdivision.

The application was granted.

IN THE MATTER OF THE PETITION OF JOHN PHILIP.

Mr. Benjamin applied for a rule *nisi* under the Derelict Lands Act to be made absolute.

Granted.

BIRD V. BIRD.

This was an action for restitution of conjugal rights.

Mr. Close appeared for plaintiff, and asked for judgment. He stated that the plaintiff Mrs. Bird gave her evidence on the 13th June last (p. 213, *supra*), and the case was adjourned until that day in order to secure an affidavit of personal service on the defendant, who was supposed to be in England.

This affidavit, which was now put in, stated that every effort had been made to render personal service on the defendant but without success, and eventually service was made upon the defendant's brother.

The decree was granted, and made returnable for 1st November, the order to be served personally, if possible, but failing this upon defendant's mother or sister, or either of his brothers.

[Plaintiff's Attorney, Gus Trollip.]

Ex parte MOLTENO.

Mr. Currey, on behalf of Mr. John Charles Molteno, a candidate at the election of members for the House of Assembly for Tembuland, applied for an order for the inspection of the marked voters' roll. The application was similar to several others which had been granted by the Court.

The application was granted.

VAN OUDTSHOORN V. DU PREEZ.

Mr. Currey asked for judgment, under Rule 319, for the sum of £58 18s., less £10 paid on account, being the sum overpaid by the plaintiff to the defendant in a Supreme Court action in which the defendant acted allow of an effort being made to find the husband.

The application was granted.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice).]

REVIEW.

QUEEN V. PLAATJES. { 1898. Sept. 20th.

Magistrate's jurisdiction—Previous conviction.

The ordinary jurisdiction of a Magistrate is limited to a sentence of imprisonment for three months, even where the prisoner has been previously convicted.

De Villiers, C.J., said: A case has come before me, as judge of the week, in which one Jacobus Plaatjes was tried before the

Magistrate of Bredasdorp for the theft of a macintosh, a blanket, and several other articles. He pleaded not guilty, but some days afterwards was found guilty, and sentenced to undergo imprisonment with hard labour for six months. But the trial took place under the ordinary jurisdiction, and although there was a previous conviction, the fact of that conviction did not justify the Magistrate in giving more than three months under his ordinary jurisdiction. The sentence must therefore be amended so as to make it three months instead of six months.

GENERAL MOTIONS.

Ex parte HERTZ AND WIFE. { 1898. Sept. 20th.

Extradition—Bail—Germany.

The Court refused to admit to bail persons under arrest and awaiting extradition on a charge of having committed an extraditable offence in Germany, the Consul-General for Germany opposing the application on behalf of his Government.

This was an application on notice to the Attorney-General and to the German Imperial Consul-General for an order admitting the petitioners, Herman Hertz and Helene Hertz, to bail.

The petitioners alleged that they were natives of Wittenberg, in Germany, and arrived in this colony per the S.S. Goth on Sunday, the 11th September, 1898. That they were arrested by Detective Hill on board the Goth on her arrival, charged with the crime of obtaining goods by false pretences from the firm of Wehner & Molker at Berlin to the value of 10,000 marks (£500) during the months of June and July last. That on the 12th September they were brought before the Assistant Resident Magistrate of Cape Town, and charged with the aforesaid crime, and remanded for a week. That the first-named petitioner knew absolutely nothing about the matter, and had never had any dealings with the said firm, while the second-named petitioner dealt exclusively with the said firm in her own name. That the said firm of Wehner & Molker gave credit from time to time to the second-named petitioner, who did not owe the amount now claimed, the account being a disputed one, and did not receive goods, as alleged in the warrant, in June and July last, but bought certain goods from the said firm in June, for which she paid 400 marks. That the first-named petitioner was sixty-one years old and in very delicate health, and was informed and verily believed that it would be at least three weeks before the extradition documents arrived from Germany, and a much longer period before the order of extradition could be granted. That the petitioners were anxious to obtain bail, and were prepared to enter into such security as might be fixed, and to appear weekly before the Resident Magistrate of Cape Town until such time as the order for extradition was granted. The prayer was that the Court would admit the petitioners to bail.

The German Consul-General opposed the application and filed an affidavit in which he alleged that the prisoners were arrested on his instructions, and he had reason to believe his Government would oppose the granting of bail. It was expected that the papers would arrive shortly, and it was desired in the meantime that the prisoners be not admitted to bail.

Mr. Rose-Innes, Q.C., in support of the application: Under the Extradition Acts of 1870 and 1873 a police magistrate would not appear to have power to admit to bail, although he may under 44 and 45 Vic., C. 69, section 5. The Supreme Court has, however, the power to admit all persons to bail whether the offences with which they are charged have been committed in the Colony or not. See Ordinance 40, section 51. This is a case in which the Court would exercise its discretion.

Mr. Sheil, Q.C., for the Crown and for the German Consul-General: There is no precedent for an application of this kind in our Courts, although the general power of the Supreme Court to grant bail in cases in which offences have been committed within its jurisdiction is not questioned. Here, however, the offence was committed outside of the jurisdiction of the Supreme Court and when the representative of a friendly State opposes the application the Court, even if it had the power, would decline to exercise it, See *Regina* v. *Hool* (London "Times," 9th August, 1898). As to the cases in which the Queen's Bench admits to bail, see *Burn's Justices of the Peace* (pp. 369-370) and cases there cited,

Mr. Innes in reply.

The Court made no order on the application.

De Villiers, C.J.: I think the Court should accede to the request of the German Consul-General and postpone the matter until the papers arrive. No order will be made, but leave will be given to apply again when the papers arrive or if there should be any real danger to health.

Postea (November 7th).

The application was renewed before Mr. Justice Maasdorp and Mr. Justice Solomon.

This was an application on notice to the Attorney-General and to the German Consul-General that the application made to the Court for bail on the 20th September last would be renewed to-day.

On the 2nd instant the applicants, Hertz and his wife, were brought before the Resident Magistrate of Cape Town and committed for extradition to Germany, charged with the commission of the crimes of fraud and embezzlement.

The German Consul-General opposed the application for bail, and alleged on affidavit that he was prepared to hand the prisoners over to an officer to be conveyed to Germany at the expiration of fifteen days from the date of their committal, or within a shorter time if they would waive the fifteen days which are allowed under the Extradition Act.

Mr. Searle, Q.C., was heard in support of the application.

Mr. Sheil, Q.C., for the Crown and for the German Consul-General.

The application was refused.

Mr. Justice Maasdorp said: When this application was made in the first instance it was made at a time when the petitioners had been arrested, and were awaiting their extradition to Germany, but the order had not been issued for their extradition. The application then made was ordered to stand over, no order being granted. The position of the parties now seems to be altogether changed, for in the meanwhile the extradition order has been issued, and the authorities are prepared to despatch these prisoners to Germany at the earliest possible date. Fifteen days are, under the Act, allowed prisoners before they are sent away from this country, so that they may have an opportunity of questioning the extradition order. The matter is now wholly in the hands of the petitioners, and they can move the Court at the earliest possible date to inquire into the question as to whether the extradition order is legal. As they can move forthwith, or at a very early date, there is no necessity to allow them bail for that period, and consequently the application must be refused. There is no necessity now for any order granting leave to move for the setting aside of the extradition.

Mr. Justice Solomon concurred.

[Petitioners' Attorneys, Messrs. Innes and Hutton.]

IN THE INSOLVENT ESTATE OF ALBERT BASSON. { 1898. Sept. 26th.

This was an application for authority to be given to the Master to call a meeting for the election of a trustee in the place of the trustee originally appointed, who is now deceased, and that in the event of such an election not taking place, that some other person be authorised to pass transfer of a certain piece of land purchased from the said insolvent estate. The petition showed that the estate was surrendered on September 19, 1895, and a trustee was appointed. The petitioner purchased a piece of land in the estate for £27, but before transfer was given, the trustee died.

Mr. Molteno appeared for the petitioner, and stated that the estate had been surrendered so many years ago that it would be almost impossible to get a meeting of creditors.

De Villiers, C.J., said a provisional trustee could be appointed, with power to liquidate the estate and pass transfer of this piece of ground.

Mr. Molteno suggested Mr. A. Syfret, petitioner's attorney, as provisional trustee.

The Court then made an order appointing Mr. Arthur Syfret provisional trustee, with power to liquidate the estate and pass transfer.

MELEKOV V. FRIEDMANN.

Interdict.

An interdict restraining transfer of property refused; in the absence of prima facie *evidence of sale to the applicant as alleged by him.*

This was an application to have made absolute a rule *nisi* granted by Mr. Justice Maasdorp, calling upon the respondent to show cause why he should not be interdicted from passing transfer of certain property in Brown-street, Cape Town, pending the result of an action to be brought by applicant against the respondent. From the pleadings it appears that on September 1 Melekov obtained from Friedmann the option of purchasing the property and certain furniture for £375. Friedmann alleged that this option only held good until noon on the following day, but the applicant denied that there was any such limitation, and that even if such were the case, by subsequent negotiations entered into on September 6 the respondent showed that he waived that limitation: that on September 6 the applicant exercised his option, but the respondent sold the property to one David Goldblatt. Thereupon the present application for an interdict was made.

Mr. MacGregor for the applicant.

Mr. Benjamin for the respondent.

After hearing Mr. MacGregor,

De Villiers, C.J., said: In order to justify this interdict there ought to be some strong *prima facie* evidence that a sale has actually taken place. Here, however, the evidence of sale is extremely doubtful, and what the parties call an option is really an offer of the purchase of this property and furniture. Then the respondent says that when this option was given on September 1 it was mutually understood that it only gave the applicant an option over the property until noon on September 2, and two witnesses who were present say the same thing, viz., that the answer was to be given on the following day. It only meant, therefore, that there was an offer of this property and furnitue for £375, and that that offer only held good until twelve o'clock the following day. But there was no acceptance of the offer, and although the parties came together later, and further communications took place with regard to the property, there was nothing to prove clearly that the respondent understood that these negotiations were made by virtue of the offer made on September 1. These may have been new negotiations for the purpose of a further contract. Besides, the respondent gave the applicant to understand that if he could get another purchaser for the property in the meantime he would sell. Well he got another purchaser, and that before he got the broker's note or any notice of applicant's acceptance of the offer. The property was sold, the purchaser paid the price, and now it was sought to restrain transfer being given to him. I do not think that the Court would be justified upon, to say the least of it, such doubtful evidence in restraining the respondent from passing transfer to Goldblatt. If the applicant has a good case he should bring an action for damages for breach of contract. In my opinion the evidence of the sale is not sufficiently clear for the Court to make the rule absolute, and the rule must therefore be discharged. With regard to costs, if an action is brought by applicant against respondent for damages for breach of contract, the costs in the present action might abide the result of that action. Judgment will therefore be that the rule be discharged, and that the question of costs stand over until the last day of next term, unless an action for damages is brought and decided before that day. If no such action is brought, then an application with regard to the costs may be made by either of the parties.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton: Respondent's Attorney, C. W. Herold.]

THOMSON, WATSON, AND CO. v. BURRELL.
In re THE "CLARA."

1898.
Sept. 20th.

This was an application by Adam Guthrie Burrell for leave to set aside the writ of attachment of the steamship Clara, granted by the Chief Justice on the 15th September, on the petition of Messrs. Thomson, Watson & Co. The order made on that date was for the attachment of the vessel Clara *ad fundandam jurisdictionem*, and that upon the return of the writ of attachment the petitioners should be allowed to issue summons against Adam Guthrie Burrell, in his capacity as managing owner of the vessel and as such representing the other owners for the recovery of the sum of £202 10s. 4d., with leave to Burrell to apply on the 20th instant, to set aside the attachment.

The applicant appeared in person.

Mr. Innes, Q.C., appeared for the respondents.

The applicant said he was part owner of the vessel, and wished to have the writ set aside so that he might communicate with the other owners at Home. There were other and prior claims on the boat just as good as the one made by the respondents.

The Chief Justice explained that the attachment would not affect any prior claims, as it was made merely to found jurisdiction. The order could not be discharged, and costs in the present application would be costs in the cause.

[Respondent's Attorneys, Messrs. J. & H. Reid & Nephew.]

PALMER v. MOLTENO. { 1898. Sept. 20th.

Parliamentary election—Ballot—Inspection of rejected ballot papers —Inspection of counterfoils— Polling Officers statement— Marked voters' list.

On the application of an unsuccessful candidate, who was not present at the counting of the votes, authority given to the Registrar of the Court, after due notice to and in the presence of the parties or their agents, to open the sealed packet of rejected ballot papers and allow such parties or agents to inspect (but not to touch) the same in such a manner that the backs cannot be seen.

On the like application authority given to the Registrar, in any case where he is satisfied that a discrepancy exists between the number of ballot papers appearing from the polling officers statement to have been placed in the ballot box and the number marked off as having voted on the marked voters' list, to inspect the counterfoil, and compare the same with the marked voters' list.

This was an application on notice by George Morrison Palmer, an unsuccessful candidate at an election for a representative of the district of Somerset East in the House of Assembly.

The applicant alleged in his petition:

1. That your petitioner in pursuance of an order granted by this Honourable Court obtained access to all the marked copies of the registers used by the presiding officers at the several polling stations throughout the constituency of Somerset East during the recent Assembly election save and except one, namely, that at Paddafontein in the field-cornetcy of Braak River in the fiscal division of Somerset East.

2. That your petitioner has applied to the Colonial Secretary's Department to ascertain if the missing marked register is not amongst the other papers returned to the office. but has been informed that it had not been found by Saturday at one p.m.

3. That your petitioner is making preparations for the lodging of a petition claiming a scrutiny of the votes recorded at the aforesaid election, and for the purposes thereof requires that the missing marked register be replaced or reproduced.

Wherefore your petitioner prays for an order authorising the Registrar of this Honourable Court or such other persons as to your lordships may seem proper, subject to such conditions as to persons, time, place and mode of production, as may be thought fit, to make from the counterfoils kept in the aforesaid polling station at Paddafontein a marked register in lieu and in place of the missing one.

4. That your petitioner says further and in pursuance of an additional prayer to your lordships:

5. That at the Court held by the returning officer for the Electoral Division of Somerset East your petitioner was not represented, but has since ascertained that fifty-two ballot papers were rejected at such Court.

6. That of these fifty-two ballot papers your petitioner has, after seeking advice and from inquiries made of those present regarding the nature of the marks thereon, been led to believe many were good, and should have been counted and included in the figures returned, and are to be claimed in the contemplated scrutiny.

7. That for the due and proper preparation of his suit and in order properly to present his case to the Court your petitioner desires to be allowed to obtain access to and inspection of the aforesaid rejected ballot papers.

Wherefore, your petitioner prays that your lordships may be pleased to afford his agents an opportunity to inspect the aforesaid rejected ballot papers, subject to such conditions as to persons, time, place and mode of inspection or production as may be thought expedient, and that your petitioner's agents may be at liberty to make and take away copies of the marks upon the faces of such rejected ballot papers.

The affidavit of John Bennie Kayser, an attorney employed in making preparations for the applicant's election petition, set out that he had compared the marked copies of the lists of voters forwarded to the Colonial Officer from the different polling stations in the constituency with the number of ballot papers, which according to the account applicant against the respondent. From the pleadings it appears that on September 1 Melekov obtained from Friedmann the option of purchasing the property and certain furniture for £375. Friedmann alleged that this option only held good until noon on the following day, but the applicant denied that there was any such limitation, and that even if such were the case, by subsequent negotiations entered into on September 6 the respondent showed that he waived that limitation: that on September 6 the applicant exercised his option, but the respondent sold the property to one David Goldblatt. Thereupon the present application for an interdict was made.

Mr. MacGregor for the applicant.

Mr. Benjamin for the respondent.

After hearing Mr. MacGregor,

De Villiers, C.J., said: In order to justify this interdict there ought to be some strong *prima facie* evidence that a sale has actually taken place. Here, however, the evidence of sale is extremely doubtful, and what the parties call an option is really an offer of the purchase of this property and furniture. Then the respondent says that when this option was given on September 1 it was mutually understood that it only gave the applicant an option over the property until noon on September 2, and two witnesses who were present say the same thing, viz., that the answer was to be given on the following day. It only meant, therefore, that there was an offer of this property and furnitue for £375, and that that offer only held good until twelve o'clock the following day. But there was no acceptance of the offer, and although the parties came together later, and further communications took place with regard to the property, there was nothing to prove clearly that the respondent understood that these negotiations were made by virtue of the offer made on September 1. These may have been new negotiations for the purpose of a further contract. Besides, the respondent gave the applicant to understand that if he could get another purchaser for the property in the meantime he would sell. Well he got another purchaser, and that before he got the broker's note or any notice of applicant's acceptance of the offer. The property was sold, the purchaser paid the price, and now it was sought to restrain transfer being given to him. I do not think that the Court would be justified upon, to say the least of it, such doubtful evidence in restraining the respondent from passing transfer to Goldblatt. If the applicant has a good case he should bring an action for damages for breach of contract. In my opinion the evidence of the sale is not sufficiently clear for the Court to make the rule absolute, and the rule must therefore be discharged. With regard to costs, if an action is brought by applicant against respondent for damages for breach of contract, the costs in the present action might abide the result of that action. Judgment will therefore be that the rule be discharged, and that the question of costs stand over until the last day of next term, unless an action for damages is brought and decided before that day. If no such action is brought, then an application with regard to the costs may be made by either of the parties.

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The applicant appeared in person.

Mr. Innes, Q.C., appeared for the respondents.

The applicant said he was part owner of the vessel, and wished to have the writ set aside so that he might communicate with the other owners at Home. There were other and prior claims on the boat just as good as the one made by the respondents.

The Chief Justice explained that the attachment would not affect any prior claims, as it was made merely to found jurisdiction. The order could not be discharged, and costs in the present application would be costs in the cause.

[Respondent's Attorneys, Messrs. J. & H. Reid & Nephew.]

PALMER V. MOLTENO.

1898. Sept. 20th.

Parliamentary election—Ballot—Inspection of rejected ballot papers—Inspection of counterfoils—Polling Officers statement—Marked voters' list.

On the application of an unsuccessful candidate, who was not present at the counting of the votes, authority given to the Registrar of the Court, after due notice to and in the presence of the parties or their agents, to open the sealed packet of rejected ballot papers and allow such parties or agents to inspect (but not to touch) the same in such a manner that the backs cannot be seen.

On the like application authority given to the Registrar, in any case where he is satisfied that a discrepancy exists between the number of ballot papers appearing from the polling officers statement to have been placed in the ballot box and the number marked off as having voted on the marked voters' list, to inspect the counterfoil, and compare the same with the marked voters' list.

This was an application on notice by George Morrison Palmer, an unsuccessful candidate at an election for a representative of the district of Somerset East in the House of Assembly.

The applicant alleged in his petition :

1. That your petitioner in pursuance of an order granted by this Honourable Court obtained access to all the marked copies of the registers used by the presiding officers at the several polling stations throughout the constituency of Somerset East during the recent Assembly election save and except one, namely, that at Paddafontein in the field-cornetcy of Braak River in the fiscal division of Somerset East.

2. That your petitioner has applied to the Colonial Secretary's Department to ascertain if the missing marked register is not amongst the other papers returned to the office. but has been informed that it had not been found by Saturday at one p.m.

3. That your petitioner is making preparations for the lodging of a petition claiming a scrutiny of the votes recorded at the aforesaid election, and for the purposes thereof requires that the missing marked register be replaced or reproduced.

Wherefore your petitioner prays for an order authorising the Registrar of this Honourable Court or such other persons as to your lordships may seem proper, subject to such conditions as to persons, time, place and mode of production. as may be thought fit, to make from the counterfoils kept in the aforesaid polling station at Paddafontein a marked register in lieu and in place of the missing one.

4. That your petitioner says further and in pursuance of an additional prayer to your lordships :

5. That at the Court held by the returning officer for the Electoral Division of Somerset East your petitioner was not represented, but has since ascertained that fifty-two ballot papers were rejected at such Court.

6. That of these fifty-two ballot papers your petitioner has, after seeking advice and from inquiries made of those present regarding the nature of the marks thereon. been led to believe many were good. and should have been counted and included in the figures returned, and are to be claimed in the contemplated scrutiny.

7. That for the due and proper preparation of his suit and in order properly to present his case to the Court your petitioner desires to be allowed to obtain access to and inspection of the aforesaid rejected ballot papers.

Wherefore, your petitioner prays that your lordships may be pleased to afford his agents an opportunity to inspect the aforesaid rejected ballot papers. subject to such conditions as to persons, time. place and mode of inspection or production as may be thought expedient, and that your petitioner's agents may be at liberty to make and take away copies of the marks upon the faces of such rejected ballot papers.

The affidavit of John Bennie Kayser. an attorney employed in making preparations for the applicant's election petition, set out that he had compared the marked copies of the lists of voters forwarded to the Colonial Officer from the different polling stations in the constituency with the number of ballot papers, which according to the account rendered by the several officers in charge were inserted in each ballot box, and found that they did not in all cases correspond.

An extension of the first prayer in the applicant's petition was therefore applied for so as to include the comparison with the counterfoils of all the marked list of voters which did not correspond with the ballot paper accounts.

Sir H. Juta, Q.C., appeared for the applicant.

Mr. Schreiner, Q.C., appeared for respondent, Molteno, one of the candidates returned at the election in question.

Sir H. Juta said that the missing register had been discovered since the petition had been filed.

After argument.

De Villiers, C.J.: This is a very important application, and I therefore regret that neither of my colleagues is present to share the responsibility of the decision with me. The first part of the application asks for an inspection of the ballot papers which were rejected by the Returning Officer at the recent election for Somerset East. In support of this prayer the petitioner states that he was not present at the counting of the votes, but has since ascertained that fifty-two ballot papers were rejected by the returning officer, and that after seeking the advice and making inquiries of those who were present he has been led to believe that many of these rejected ballot papers were good, and should have been counted and included in the return. The statement that the petitioner was not present or represented at the counting of the votes is not denied. In this respect his position must certainly be unique, because there must surely be very few elections in respect of which the candidates would not consider it to be of sufficient importance to be present or represented by an agent. One of the objections raised to the order is that it would interfere with the secresy of the ballot, but with due precautions there is no greater danger to the secresy of the ballot from an inspection in the presence of an officer appointed by the Court than from an inspection in the presence of the returning officer. Another objection is that no election petition has been filed. In England this objection, I understand, has been allowed to prevail, but I do not consider that this Court is precluded by the terms of the 60th section of the Franchise and Ballot Act, 1892, from allowing an inspection of rejected ballot papers until a petition has actually been filed. The practice in regard to inspection for purposes of private litigation is not a sure or safe guide to follow in regulating the procedure in regard to elections for members of Parliament, which are matters of great public importance. After all, it is in the public interest that the truth and the whole truth should be disclosed, and the sooner this is done the better for all concerned. Without saying what the decision of the Court would have been if the petitioner had been present at the counting of the votes, I am of opinion that the first part of the application should be granted. The Registrar, after due notice to and in the presence of the parties, will open the sealed packet of rejected ballot papers and allow the parties or their agents to inspect (but not to touch) the papers in such a way that the backs cannot be seen. After the inspection he will reseal the packet and hand it back to the Colonial Secretary. The second part of the application asks that the Registrar be authorised to inspect the counterfoils in those cases where he is satisfied that there is a discrepancy between the number of ballot papers appearing from the polling officer's statement to have been placed in the ballot box, and the number marked off in the marked voters' lists with the counterfoils. If the authority is confined to those cases in which a discrepancy is found to exist there will be no danger of the decision leading to numberless applications of the same kind. The application will be granted, and the Registrar authorised to make a note in red ink against the names of those persons whose names are not marked off on the marked voters' lists although they appear from the counterfoils to have voted. He will then reseal the counterfoils and return the same to the Colonial Secretary.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné: Respondent's Attorney, V. A. van der Byl.]

CASES DECIDED IN THE SUPREME COURT,

CAPE COLONY.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice LAURENCE (Judge-President).]

MAGISTRATE'S COURT CASE REVIEWED.

1898. Oct. 12th.

Spare diet.

Where consecutive sentences exceed three months no spare diet can be ordered.

De Villiers, C.J. said: A case has come before me as judge of the week where the prisoner was charged with theft, found guilty, and sentenced to three months' imprisonment, two days in each week to be on spare diet. The Magistrate ordered this sentence to commence after the expiration of another sentence of £1 fine, or a month's imprisonment. The fine has not been paid, and the imprisonment will therefore be for four months. There can be no spare diet ordered where the term of imprisonment exceeds three months; therefore the part of the sentence relating to spare diet must be expunged.

PROVISIONAL ROLL.

ROUX V. DUGGIN.

Mr. Maskew applied for final adjudication of the defendant's estate.

Granted.

HANKEY AND ANOTHER V. RABINOWITZ.

Mr. Innes, Q.C., applied for final adjudication of the defendant's estate.

Granted.

G. FINDLAY AND CO. V. BLIGHT AND BENNETT.

Mr. Close applied for final adjudication of the defendants' estate.

Granted.

LE SUEUR V. WEBNER.

Mr. Buchanan applied for provisional sentence on certain conditions of sale under which the defendant purchased certain landed property at the price of £504.

Granted.

BOSMAN AND OTHERS V. DE BEER.

Mr. De Waal applied for provisional sentence on a promissory note dated July 19 last for £126 16s. 3d.

Granted.

BOSMAN AND OTHERS V. MCKELLAN.

Mr. De Waal applied for provisional sentence for the interest on a promissory note for £79 8s. 7d., dated June 6 last, and costs of suit.

Granted.

BAM V. ROBERTSON.

Mr. Maskew applied for provisional sentence on a sum of £90, interest due on a mortgage bond for £3,000.

Granted.

CLYNE V. BURRELL AND OTHERS.

Mr. Buchanan applied for provisional sentence on an acknowledgment of a debt of £50, dated July 4, 1898, ceded to plaintiff by one Dobie.

The defendant Burrell appeared in person, and said the note bore the name of himself and a man named Dobie. Clyne had given Dobie another note for £50, but had never paid the note. Defendant got the money from Dobie. The note was ceded to Clyne. If the money was paid, it would be paid into Clyne's estate, and Dobie would lose his money.

Provisional sentence was granted.

SOUTH AFRICAN ASSOCIATION V. DAY.

Mr. Molteno applied for provisional sentence for £39, interest due on an acknowledgment of debt, and £39 17s. 8d., amount of premium paid and interest.

Granted.

AFRICAN BANKING CORPORATION V. ROOS.

Mr. De Waal applied for provisional sentence on a promissory note for £33 12s. 3d., and interest at 6 per cent., less £30 paid on account.

Granted.

DE VILLIERS V. WESSELS.

Mr. Maskew applied for provisional sentence for £22 10s., interest on a mortgage bond for £450.

Granted.

GIBSON V. WALKER.

Mr. MacGregor applied for a decree of civil imprisonment on an unsatisfied judgment for £449 19s. 10d. and taxed costs.

Granted.

ABRAHAMS V. LIEBERT.

Mr. MacGregor applied for provisional sentence on a promissory note for £69 5s. 7d., and interest from September 13, 1898, and also on an IOU for £25.

Granted.

NICHOLS V. BENNETT.

Mr. De Waal applied for provisional sentence on an acknowledgment for £79 5s. 4d., less £35 paid on account of debt.

Granted, subject to the proper stamp being affixed to the document.

PHILIP BROS. V. STEVENS.

Mr. Ashburnham applied for judgment under Rule 329D for £97 0s. 1d., interest, and costs of suit.

Granted.

COLLECTOR OF CUSTOMS V. ANDERLIN.

Rule 329D—Forfeiture under Act 10 of 1872.

Mr. Sheil, Q.C., applied under Rule 329D for an order for the forfeiture of certain property seized by the Collector of Customs under Act 10 of 1872, sections 54 and 55.

Granted.

COLLECTOR OF CUSTOMS V. SMITH.

Mr. Sheil, Q.C., applied under Rule 329 for an order declaring the forfeiture of a certain bicycle seized by the Collector of Customs under Act 10 of 1872, section 23.

Granted,

THOMSON, WATSON AND CO. V. BURRELL.

Mr. Innes, Q.C., applied for judgment under Rule 329D for £202 10s. 4d., for coals supplied and cash advanced.

Granted.

SEDGWICK AND CO. V. CORLETT.

Mr. Upington applied under Rule 329D for the costs of a summons for £69 18s. 3d., the capital amount having been paid.

Granted.

REHABILITATIONS.

Jacob François Minnaar Retief, Jacobus Johannes Maynier, Hendrick Petrus Jacobus Buys, Thomas Henry Edward Trollip, Daniel Jacobus Brink, and Christian George van Schalkwyk were rehabilitated on motions from the Bar.

GENERAL MOTIONS.

IN THE MATTER OF THE PETITION OF SARAH MAGDALENA SPRECKLEY.

Mr. Benjamin applied for a rule *nisi* for leave to sue *in forma pauperis* in an action for restitution of conjugal rights to be made absolute, and for leave to sue by edictal citation.

The Court made the rule absolute, with leave to sue by edictal citation; rule returnable on the last day of next term; service to be effected in the same way as the rule *nisi*.

IN THE MATTER OF THE PETITION OF ANN WILLIAMS.

Mr. Upington applied that a rule *nisi* under the Derelict Lands Act be made absolute. The applicant had died since the original application had been made, but an executor had been appointed. Counsel asked that the name of the executor be put in the place of the deceased in the petition.

The Court made the rule absolute.

IN THE MATTER OF THE PETITION OF FRANZ UNTIEDH.

Mr. Gardiner applied that the rule *nisi* under the Derelict Lands Act be made absolute.

The Court made the rule absolute.

MERRINGTON AND ADAMS v. WELT. { 1898. Oct. 12th.

Restraint of trade—Husband and wife—Divorce—Interdict.

The respondent's husband, to whom she was married in community, sold to the applicants the goodwill of their general dealer's business in the district of T. for £500 and it was a condition of the sale that the seller should abstain from transacting or being interested directly or indirectly in any business in the district for ten years.

Held *that the respondent, after being divorced from her husband on the ground of his adultery, could not be restrained from carrying on a business in her own name and on her own behalf in the said district.*

This was an application for an interdict restraining the respondent from carrying on business within the district of Tulbagh for a certain period.

The applicants alleged that Herman Welt, to whom the respondent was married in community of property and who had previously carried on the business of a general dealer in the district of Tulbagh, had sold to them the goodwill of the business for the sum of £500; in the agreement of sale was a condition to the effect that the seller should abstain from transacting or being interested, directly or indirectly, in any business in the district for the term of ten years; the respondent, notwithstanding the period of ten years had not expired since the date of the agreement, had started a business in Tulbagh in opposition to the applicants, and they prayed that she might be restrained from doing so until the ten years had elapsed.

It appeared from the affidavits filed that the business had been largely made by the respondent herself, that Herman Welt had himself abstained from infringing the contract but that subsequent to its execution he had been divorced from the respondent on the ground of his adultery. The respondent alleged that she had thereupon found it necessary to do something for the support of herself and her minor child, and had offered her services to the applicants but they had declined to employ her; she said she was no party to the agreement relied upon and that it was not binding upon her, and that moreover her business did not interfere with that of the applicants as she dealt principally in millinery. The business was carried on in the house belonging to her husband.

Mr. Upington, for the applicants: A wife is equally bound with her husband during his life and after his death or after divorce to the extent of one-half. The intention of the parties was that both should be restrained. The affidavits show that the wife built up the business and assisted in carrying it on: the inference from this is that it was intended to restrain her. She is moreover in the enjoyment of part of the consideration for the sale.

Sir H. Juta, Q.C., for the respondent: A personal obligation cannot be divided. If it was intended to restrain the wife that should have been inserted in the contract. Possibly divorce may not have been contemplated, but death should have been contemplated. A personal obligation entered into by one partner cannot affect another partner after the death of the first.

Mr. Upington: If damages were awarded for breach of the contract they would be divided, and that shows that the liability is a joint one.

De Villiers, C.J.: The applicants purchased from Herman Welt the goodwill of his general dealer's business in the district of Tulbagh for £500, and it was a condition of the purchase that the seller should abstain from transacting or being interested, directly or indirectly, in any business in the district for ten years. The seller did so abstain, but his former wife, from whom he has been divorced on the ground of his adultery, has started a business in the district. The object of the present application is to restrain her from carrying on such a business until the period of ten years has expired. In my opinion the restraint is not binding on her after the dissolution of her marriage and the consequent termination of the community of goods. She can no longer be regarded as the agent of her husband nor would he, in any other way, derive any benefit from her business. She proposes to carry on her business in her own name and on her own behalf, and the restraint imposed on her husband cannot be held to be any longer binding on her. The application for an interdict must be refused with costs.

Laurence, J.P., concurred.

[Applicants' Attorneys, Messrs. Walker & Jacobsohn; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

OXLAND V. KEY.

1898.
Oct. 12th.

Jurisdiction—Resident Magistrate's Court—Appeal—Tacit agreement—Arbitrator—Award—Prorogation or extension of jurisdiction.

The applicant sued the respondent in the Resident Magistrate's Court of Kokstad, and the respondent, who did not reside in the district, raised no objection to the jurisdiction. The decision being against the respondent he appealed to the Chief Magistrate, who altered the judgment, whereupon the applicant applied to the Supreme Court for an order to set aside the Chief Magistrate's judgment on the ground that, as the Court of first instance had no jurisdiction, its judgment was in the nature of an award and could not be appealed against.

Held, *that there was not sufficient proof of a tacit agreement between the parties to submit the dispute to the final award of the Magistrate of Kokstad, but that there was proof of an agreement to extend his jurisdiction, and that consequently the applicant, who had selected his* forum, *could not object to an appeal to the Supreme Court.*

The case of Riversdale Divisional Council v. Pienaar (3 Juta, 252) *was not intended to decide that parties to a suit might not by their conduct be held to have tacitly agreed to accept the Resident Magistrate as an arbitrator to finally determine a dispute between them.*

This was an application for a review of the judgment of the Acting Chief Magistrate of East Griqualand.

The applicant stated that certain differences had arisen between himself and the respondent Bishop Key, and that although neither of them resided within the jurisdiction of the Court of the Resident Magistrate of Kokstad they had nevertheless agreed to submit their differences to the final determination of the said Magistrate; that the said Magistrate had heard the parties and their witnesses and given his decision on the matters in dispute. The respondent had thereupon appealed to the Chief Magistrate of East Griqualand, but when the appeal was called on the applicant objected to the jurisdiction on the ground that there was no consent to submit the difference to his jurisdiction, and that the Magistrate's decision had only the effect of an arbitrator's award, and was not subject to an appeal to a higher Court except upon grounds similar to those on which the award of an arbitrator would be set aside. The Acting Chief Magistrate overruled this contention and treated the matter as an ordinary appeal from an ordinary judgment of a lower Court and upheld the appeal with costs.

The applicant alleged that this ruling was a gross irregularity both in law and in procedure and asked for an order upon the Acting Chief Magistrate to forward the record and show cause why the judgment should not be cancelled and set aside by reason of such gross irregularity.

The Acting Chief Magistrate in the course of his judgment said as follows: "Respondent contends that the proceedings in the Court below were to all intents and purposes in the nature of arbitration inasmuch as the appellant did not reside in the district of Mount Currie. This question was not raised in the Court below and there is nothing in the record which can lead to the conclusion that the appellant was not residing within the jurisdiction of that Court. It would appear too that the case was regarded by all the parties as a judicial one in the ordinary sense of the term. Respondent therefore cannot now be heard to say that this Court has no jurisdiction to hear this appeal."

Sir H. Juta, Q.C., for the applicant: No jurisdiction can be given by consent. The Magistrate is in the position of an arbitrator only and no appeal lies from his decision. *Riversdale Divisional Council* v. *Pienaar* (3 Juta, p. 252).

[De Villiers, C.J.: There is nothing in that judgment to show that there may not be a waiver. You brought the Bishop before the Court: can you now take advantage of a want of jurisdiction?]

According to *Pienaar's case* no consent or waiver can give jurisdiction to a Resident Magistrate's Court. It has been held that where a defendant resides in one district and is sued in another the Magistrate has no jurisdiction.

[De Villiers, C.J.: That is where the defendant has objected. *Pienaar's case* deals only with want of jurisdiction as to the amount.]

The application was refused.

De Villiers, C.J.: The applicant sued the Bishop in the Resident Magistrate's Court of Kokstad, and the Bishop raised no objection to the jurisdiction. He was not subject to the jurisdiction, but he had written to the applicant, who was plaintiff in the suit, that he, the Bishop, would in order to expedite matters consent to the case being tried before the Magistrate. The Magistrate did try the case and decided certain points against the Bishop, who thereupon appealed to the Chief Magistrate's Court. An objection was taken by the applicant to the jurisdiction of the Chief Magistrate, who disallowed the objection and allowed the appeal. The applicant now applies for an order to review and set aside the decision of the Chief Magistrate on the ground that the Magistrate of Kokstad had no jurisdiction to take judicial cognisance of the case, and that his decision was really in the nature of an award of arbitrators from which there is no appeal to a higher Court. The cases in which the question of jurisdiction has been hitherto raised have been those in which the defendant and not the plaintiff has objected to the competence of the inferior Court. In the case of *Riversdale Divisional Council* v. *Pienaar* (3 Juta, 252), it was pointed out that the parties to a suit can not confer on an inferior Court—as a Court—a jurisdiction over matters in respect of which the law gives it no jurisdiction. It was not intended to decide that the parties cannot agree to refer the dispute to the Magistrate as an arbitrator and to be bound by his decision. The term "arbitrator" may not be used by the parties, but where it is manifest from their conduct that they wish the Magistrate to finally decide the dispute and bind them both by his decision, there is no reason in law why he should not undertake the arbitration. It is quite competent, therefore, for the applicant to argue, as he has argued, that if it is manifest from the proceedings in the Court of the Magistrate of Kokstad, that the parties intended to refer the dispute to the final determination of the Magistrate, the Bishop had no right of appeal to the Chief Magistrate. Such a reference would have been a proceeding *extra cursum curiae*, from which no appeal would lie to a higher Court. In the *Riversdale Divisional Council case* a distinction was drawn between want of jurisdiction in respect of the parties to a suit and want of jurisdiction in respect of the subject matter of a suit. The distinction was fully recognised by the old text writers and was elaborately discussed by *Vinnius* in his dissertation on jurisdiction (Chapt. 11). He goes further than most writers in admitting extension of jurisdiction in respect of the subject matter, but this Court has repeatedly held that the jurisdiction of magistrates as such cannot be extended by the parties to matters not included within it by Statute. A different practice, however, prevails where the defect in jurisdiction arises from a personal privilege of the parties. A person cannot in the ordinary course be sued in the Court of a magistrate in whose district he does not reside, but if he has expressly or tacitly submitted to the jurisdiction he cannot, in civil cases at all events, object to the exercise of such jurisdiction. Upon this point our practice is in accord with that of the Roman law as well as of the Dutch law, see *Voet* (2, 1, 35); *Vinnius de Jurisd.* (11, 4 to 11). What evidence then is there of a *prorogation* of the Magistrate's jurisdiction in the present case? The plaintiff himself, who now seeks to take advantage of the lack of jurisdiction, invoked that jurisdiction by suing the defendant in the Court of a district in which the defendant was not residing. The defendant took no exception and does not now object to the Magistrate's want of jurisdiction. Clearly then the jurisdiction was properly exercised and cannot now be objected to by the plaintiff. If the jurisdiction was properly exercised the judgment stands on exactly the same footing as if both parties had resided in the district. *Cf. Vinnius de Jurisd.* (11, 12). There was a right of appeal to the Chief Magistrate and of this right the defendant availed himself. The plaintiff now applies to set aside the order of the Chief Magistrate, not because he was wrong on the merits but because he had no right to hear the appeal. It is clear that the application must be refused with costs.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné.]

HAASBROEK V. COLONIAL GOVERNMENT. { 1898. Oct 12th.

Mr. Sheil, Q.C., applied for an order to have judgment signed against plaintiff for not proceeding with his cause.

The Court granted the application.

DAVISON BROS. V. COLONIAL GOVERNMENT.

Arbitration—Award—Rule of Court—Costs.

Where by a deed of submission to arbitration it was agreed that the costs should be in the discretion of the arbitrators but that they should be subject to taxation by the Taxing Officer, and the arbitrators awarded that all costs should be paid by the respondents and the respondents objected to the award being made a Rule of Court before taxation, the objection was over-ruled.

This was an application on notice calling upon the respondent, Mr. C. B. Elliott, in his capacity as General Manager of Railways, and as such representing the Colonial Government, to show cause why the award of the arbitrators in the matter of the expropriation of certain land situate at Woodstock, in the Cape Division, should not be made a rule of Court, and why the respondent should not be ordered to pay the costs of the application.

The deed of submission contained the following clause: And the said parties hereto lastly mutually covenant and agree that the cost of these presents, of the said arbitration, and the fees of the arbitrators, and of drawing the award and making the same a rule of Court, shall be in the discretion of the said arbitrators, as the case may be, who shall direct and award by whom and to whom and in what manner the said shall be paid, provided that any costs so awarded shall be subject to taxation by the Taxing Officer of the Supreme Court.

The arbitrators awarded the present applicants £1,500, and further awarded that all costs of the submission, references, and award, including the arbitrators' fees, should be paid by the Government.

In answer to the notice of motion, Mr. J. A. Reid, solicitor for the Government, filed an affidavit, in which he alleged that the first part of the award had been complied with, the £1,500 awarded having been paid to the applicants some months ago.

That with regard to the second part of the award, he had, on behalf of the respondent, offered to pay the arbitrators' fees and the sum of £14 18s. 9d. for the applicants' attorneys' costs.

That he understood the applicants' attorneys to admit that the sum offered would be all that they would be entitled to as between party and party, but they contended that under the award they were entitled to costs between attorney and client as well as between party and party.

He submitted that the applicants' attorneys were wrong in their contention, and that there was no necessity to have the award made a rule of Court, inasmuch as the sum offered to them in payment of their costs was fair and reasonable.

That he had offered on behalf of the respondent to consent to the question between the parties being decided by the arbitrators themselves, but the applicants' attorneys refused to consent to this course.

That it was not usual in similar arbitration cases to have the award made a rule of Court; he did not think that this was done in one case out of twenty.

That he annexed a copy of the applicants' attorneys' bill of costs, upon which he had marked the items which, in his opinion, should not be allowed as between party and party. (These items amounted to £19 5s. 5d.) The chief items objected to were the following:

1. A fee of £4 4s. for attending before the arbitrators, from which he deducted £1 1s. The actual arbitration proceedings did not last three hours.

2. Three witnesses at £3 3s., £4 4s., and £5 5s. respectively. In allowing £1 1s. for each of these witnesses he had exceeded the tariff rate.

3. One witness at £5 5s. This witness was neither an auctioneer, an appraiser, nor a broker, and was in no way specially qualified

to express an opinion upon the value of landed property, and as a matter of fact was not called or even present at the arbitration.

4. £2 2s. for letters, papers, &c., a charge which was never allowed in similar cases.

The remaining items consisted of small sums which were clearly attorney and client charges.

The applicants' attorney filed an answering affidavit in which he contended for the right of the applicants to have the order as to the payment of costs in the award interpreted by the taxing officer, and to enable them to obtain such interpretation it was necessary to have the award made a rule of Court, as the taxing officer refused to tax the bill until this had been done. He further alleged that he did not admit that the amount tendered would be all the costs the applicants would be entitled to as between party and party.

Mr. Molteno appeared for the applicants.

Mr. Sheil, Q.C., for the Government: We do not object to the award being made a rule of Court, but we object to paying the costs of the application, because there is no necessity to have it made a rule, inasmuch as the amount tendered was sufficient. *Burger* v. *Cape Central Railway* (6 Juta, p. 130). In England, before 1889, arbitrators could not allow costs between attorney and client (52 and 53 Vict., c. 49).

In the present case our contention is that the arbitrators had no power to award *all* costs if they include costs between attorney and client.

If the matter goes before the Taxing Officer he will probably be guided by the decision in *Van As* v. *Nel* (8 Sheil, 129).

[De Villiers, C.J.: How can the matter be decided before the taxation?]

It is difficult to decide the matter without going into the bill of costs.

Mr. Molteno: We are content to submit the whole question of costs to the Taxing Officer and to abide by his decision.

De Villiers, C.J.: The only question to be decided now is whether the award is to be made a rule of Court. It is clear that it must be made a rule of Court because otherwise the costs cannot be settled by the Taxing Officer. If either party is dissatisfied with the decision of the Taxing Officer they can apply for a review. The application will be granted with costs.

[Applicants' Attorneys, Messrs. Sauer & Standen; Respondents' Attorneys, Messrs. J. & H. Reid & Nephew.]

IN THE MATTER OF THE PETITION OF DANIEL JACOBUS BLOM.

Mr. De Waal applied for the cancellation of a certain mortgage bond.

The Court granted a rule *nisi* calling upon all concerned to show cause before the last day of next term why the bond should not be cancelled.

IN THE MATTER OF THE PETITION OF MARY ANN GRIEG.

Mr. Gardiner applied for leave to the applicant to sue for restitution of conjugal rights by edictal citation.

The Court granted the application.

IN THE ESTATE OF THE LATE WILLIAM HOBBS AND PREDECEASED SPOUSE, ELIZA HOBBS.

Mr. Benjamin applied for an amendment of the order of Court dated 13th July, 1898 by adding the words "and Glenfillan extension" to "the farm Glenfillan."

The Court granted the application.

IN THE MATTER OF THE PETITION OF MARIA CAROLINA SUSANNIA GOLDMAN.

Mr. Buchanan applied for a rule *nisi* for leave to sue for restitution of conjugal rights *in forma pauperis*.

The Court granted the application.

IN THE MATTER OF THE WESTERN PROVINCE EXPLORATION SYNDICATE, IN LIQUIDATION.

Mr. Buchanan presented the liquidator's report.

The Court granted the usual order.

REGINA V. QEWE.

1898.
Oct. 12th.

Evidence—Reading over—Magistrate's Court.

Where at a criminal trial the evidence given by a particular witness at the preliminary examination was simply read over to him, the Court refused to quash the conviction on this ground inasmuch, as the other evidence was regular and sufficient.

This was an appeal from a sentence passed upon the appellant by the Resident

Magistrate of King William's Town, the case having been remitted under the Act 35 of 1893.

The prisoner was charged under the provisions of Act 35 of 1893 with the crime of theft, in that upon or about the 27th day of July, 1898, and at Kentbury, in the district of King William's Town, the said Joe Qeme did wrongfully and unlawfully steal two sheep, the property of or in the lawful possession of Alfred Augustus Fletcher, a farmer, residing at Kei-road.

On the 15th August last a preliminary examination was held by the Resident Magistrate. From the evidence given in that proceeding it appeared that on the 27th July the prisoner, who had lived on Mr. Fletcher's farm for about ten years, told Mr. Fletcher's herd that on the previous day he had bought two old sheep from his master for 5s. each. The entire flock of sheep were then driven to a kraal on the farm, and two old ewes were given to the prisoner, who took them away, and subsequently killed them, the skins being afterwards found in his hut.

On the 29th August further evidence was taken by the Assistant Resident Magistrate. Mr. Fletcher denied that he had sold or given any sheep to the prisoner on the 26th July, or on any day during that month. The record was sent to the Solicitor-General in the ordinary course, and he remitted the case to the Resident Magistrate under Act 35 of 1893.

At the trial the Resident Magistrate read over the evidence given by Mr. Fletcher on the 29th August, and Mr. Fletcher was cross-examined by the prisoner's attorney on the evidence given by him on both occasions.

The Magistrate fouud the prisoner guilty, and sentenced him to twelve months' imprisonment with hard labour and to pay a fine of £5, and in default of payment, to be imprisoned and kept to hard labour for a further period of six months. From this sentence the prisoner now appealed on the following grounds :

1. That the indictment against the accused was vague and insufficient, he having been charged under the provisions of Act 35, 1893, and not with contravening any particular section of Act 35 of 1893.

2. That the proceedings were irregular, in that the evidence of Alfred Augustus Fletcher given at the examination held on the 29th August before Mr. Eustace, A.R.M. was at the trial before Mr. Garcia, R.M., read over to the witness.

3. That on the merits of the case it is maintained that there is no evidence of any intention to steal on the part of the accused.

Mr. Close, for the appellant: The Magistrate's Court Act contemplates a magistrate being able to form his judgment point by point and not taking it in a lump. *Regina* v. *Damon Charles* (13 S.C.R., p. 78). The rest of the arguments of counsel were based on the merits of the case.

Mr. Sheil, Q.C., for the Crown.

De Villiers, C.J.: The prisoner was charged with the theft of two sheep, therefore it was not necessary to mention any particular section of the Act in the indictment. I must say I think it would have been a more regular course to have called the witness Fletcher in the regular way and allowed him to give his evidence in the regular way. If that were the only evidence affecting the prisoner I should have hesitated to find him guilty upon that evidence. But seeing that there was other evidence which was regular and sufficient I don't think the conviction should be quashed on this ground. But the more important objection is the third, that on the merits of the case there was not sufficient evidence to convict. Prisoner stated positively that the sheep were sold to him by Fletcher, and Fletcher positively denied this. It seems extremely probable that there was some misunderstanding. The accused was an old man who had been on the farm ten years, and there was nothing against his character. Upon the whole, we think we will be doing justice if we quashed the sentence.

[Appellant's Attorney, Mr. D. Godlonton.]

In re CAPE OF GOOD HOPE PERMANENT BUILDING SOCIETY. { 1898. Oct. 14th. ,, 26th.

Building society — Partnership — Winding up — Contributories — Calls — Rules of society — Powers of directors — *Ultra vires* — Borrowing powers — Loan creditors — Ordinary outside creditors.

A building society, being an association of persons subscribing to a common fund to be advanced on interest to some of *the members on the security of landed property, does not constitute a partnership.*

Persons dealing with such a society must make themselves acquainted with its rules, and where under such rules the directors have power to borrow money not exceeding a certain limit, the members are not bound, in case the limit is exceeded, to pay such excess except to the extent to which the society is proved to have benefited by the excessive borrowing.

On the winding up of such a society members who have received advances repayable in instalments become liable to pay forthwith the full balances owing by them and, in case of an insufficiency of assets for the payment of the costs of liquidation, the claims of ordinary outside creditors in full and the loan debts to the extent authorised by the rules, all the members are personally liable to contribute towards the payment of the deficiency.

This was an application by the official liquidators to have a rule *nisi* made absolute; the rule called upon all persons whose names appeared on the list of contributories of the Cape of Good Hope Permanent Land Building and Investment Society to show cause why the list should not be settled accordingly and a call made on them of £20 a share. The society was established in the Colony in 1877, and certain rules had then been framed by which its transactions were governed. In 1884 fresh rules were framed which, however, did not materially differ from the rules of 1877. In August, 1897, the society was registered as a limited liability company under the Companies Act 25 of 1892, and fresh rules were framed. In April, 1898, certain defalcations made by the secretary of the society were discovered, and at a meeting of shareholders and depositors held on May 5, 1898, Messrs. G. W. Steytler and Harry Gibson, together with the auditors of the society, were appointed as special auditors to inspect the books, securities, and accounts of the society, and to report thereon. The auditors reported that defalcations to the extent of £37,057 sterling had been traced, and that the financial position of the society was then as follows: Liabilities—defalcations, £37,057; deposits, £44,364; overdraft at bankers, £4,242; total, £85,603. Assets—mortgage bonds, £49,905; landed property, £10,228; total, £60,133; leaving a deficiency of £25,530 to be provided for. In consequence of the large amount of defalcations as aforesaid the society was wholly unable to meet its liabilities, and it was voluntarily wound up by the Court on the 21st July, 1898.

On the 31st August the liquidators presented a report to the Court (see p. 319), and the rule *nisi* now sought to be made absolute was granted.

The memorandum of association contained the following clauses:

3. The objects of the society are:

(*a*) For receiving money on deposit at interest.

(*b*) For lending and investing the funds of the society to members upon security of freehold and quitrent estate by way of mortgage.

(*c*) Generally to build or purchase landed property and to do and perform all such acts as may be found necessary, incidental, or conclusive to the carrying out and attainment of the objects of the society.

4. The liability of the members is limited.

5. The capital of the society is £4,812 9s. 10d.

Clause 11 of the prospectus was as follows: *Qualification.*—Borrowers must be members of the society. The shares are 5s. per month for each £50 and six months' payments are all that are necessary in order to borrow. Thus a borrower must invest in the society 30s. for every £50 he borrows. This amount is placed to his credit and is returned to him upon redemption of the loan, with compound interest added, at the rate of 5 per cent. He is then free of the society, and has no further subscriptions to pay.

The following rules and regulations taken from the original rules of the society, the memorandum of association, and prospectus were referred to in the argument and judgment:

The Books of Rules of 1877 and 1884 contained a statement of the constitutional basis of the society by way of preface including the following, viz.:

2. "No liability of any kind incurred by members." This was no included in the memorandum of association or rules published in 1897.

Rule 2. That the object contemplated is for making advances to members out of the funds of the society upon security of freehold, or leasehold estate, by way of mortgage.

Rule 22. That the Board of Directors shall have power to borrow any sum for the purpose of the society, to advance to their members, either from their bankers or any other source, not exceeding two-thirds of the amount secured to the society by mortgages from its members.

Rule 37. The shares shall be of the ultimate value of fifty pounds. Every member on entering the society or taking additional shares shall pay an entrance fee of two shillings per share, and a monthly subscription of five shillings. Interest on such subscription shall be added until such time as the subscription and interest shall have reached the sum of £50.

Rule 47. No applicant shall receive an advance upon shares until he has paid six months' subscriptions.

Rule 61. That shares, &c., may be withdrawn on giving one month's notice according to the schedule annexed to these rules.

Rule 63. Any member having received an advance from the society, may elect to discontinue his monthly subscriptions upon his investing shares by giving one month's notice through the secretary, should the directors consider that the circumstances of the society admit of it, thereby foregoing all future profits upon such shares, and in such case the amount of subscriptions already paid on such shares shall be placed to his credit in substitution of the last ultimate repayments. And such member shall lose all power of vote in respect of such shares unless he shall have held them for five consecutive years.

Rule 65. That when any subscriptions or fines shall remain due or unpaid, for any shares proposed to be withdrawn, the amount of such unpaid subscriptions and fines shall be deducted from the sums set down in Rule 62, and the balance thereof shall be payable; such fines to be calculated up to the time on which the name of the applicant for withdrawal is placed on the list kept for that purpose.

Rule 67. That all fines, fees, interest and commissions whatsoever, mentioned in these rules, shall be passed to the credit of a management and contingent fund account, and interest and bonus, and the expenses of management, and any losses which may be incurred by the society shall be defrayed out of the said fund, and the deficiency (if any) shall be debited to the holders of shares, in proportion to the number of such shares held by each member, and according to the length of time the same shall have been in existence.

Rule 69. The Board of Directors are authorised from time to time to lay out, invest, or dispose of any or of all such sums of money not required for immediate use; and from time to time to alter and transfer the same as may be most expedient.

Rule 71. The directors may receive from time to time deposits from shareholders and others of not less than 2s. 6d., upon which five per cent interest will be allowed, or such other rate, and in the conditions set down in Rule 64, &c., &c.

Rule 74. The word member shall mean any person holding not less than one share. The word borrower shall mean those persons holding advanced shares. The word depositor shall mean persons who lend money at interest to the society. And the words advanced shares shall mean those shares upon which advances have been made and secured by mortgage.

Mr. Solomon, Q.C., appeared for the liquidators.

Mr. Schreiner, Q.C., appeared for certain of the respondents, viz.:—Messrs. Boos, Finch, Baldwin, Langford, Crookshank, Schneider, Reimer, Manson, Rutter, Chaplin, De Kock, Amaldien, and eleven others.

Mr. Close appeared for the respondent Slater.

Mr. Innes, Q.C., appeared on behalf of the directors.

Numerous affidavits were filed by the respondents setting forth the circumstances under which they respectively became members of the society and repudiating liability on the merits of their individual cases, but in view of the general grounds of the judgment of the Court it is unnecessary further to refer to them.

Mr. Schreiner: Building Societies are not regulated or governed by statute in this colony. They are only recognised in the Stamp Act 3 of 1864. Schedule 17, paragraph 10, fixes the licence to be taken out and there distinguishes them from Joint Stock Companies. That is an indication that a Building Society is not a Joint Stock Company at all. The rules and principles governing such a society and its contracts are those of principal and agent. A Joint Stock Company must have a capital divided into shares. In England these companies are specially regulated by statute. The first statute dealing with them is 6 and 7 Will IV., c. 32. The cases decided under this Act show that they had no power to borrow money. It is because of the borrowing of money by this society that the large defalcations causing the deficiency became possible, and the society has fallen into its present position. A later statute 37 and 38 Vict., c. 42 (1874), in section 14 limits the liability of members and in section 15 makes provision for borrowing within certain limits. This society was organised in 1877 and the organisers had before them the provisions of 37 and 38 Vict., c. 42. If sections 14 and 15 of that statute had been referred to in the rules they would have been binding upon all persons dealing with the society. The Society's Rules of 1877 and 1884 were in force until 1897 and those Rules had prefacing them a statement of the constitutional basis of the society; that included the statement that no liability was incurred by members. That statement was binding on all persons dealing with the society; they were put upon inquiry in the same way as anyone dealing with an agent must inquire into the agent's authority. In August, 1897, at a date when the great obligations incurred by the society and sought to be recovered from the shareholders had already been incurred, the directors sought to register it as a company with limited liability. In the memorandum of association the capital is stated as being £4,812 9s. 10d.; it really fluctuated inasmuch as the shareholders and subscriptions varied. However, as fas as creditors are concerned, the capital is £4,812, and they have no recourse beyond that. Rule 22 limits the directors' borrowing power to two-thirds of the amount secured to the society by mortgage.

[De Villiers, C.J.: Do you say this is not a company at all?]

No; it is a society.

[De Villiers, C.J.: Then the Court has no power to wind it up.]

Under section 216 of Act 25 of 1892 the Court has the power. The respondents, contention is, that this is not an ordinary partnership; the depositors do not look to the individual shareholders but to the assets. The registration with limited liability ought never to have taken place, and it must be looked upon as a nullity; the society must be looked upon as being under the rules only. Van Heerden has paid every penny on his shares. A distinction is drawn in the rules between advanced and unadvanced members. Rule 37 and *Prospectus*. Where members have paid down a certain amount, and closed the account their shares should have been cancelled, and their names struck off. Boosé applied in July, 1897, for a loan of £1,400 and in order to obtain this paid £42, being six monthly subscriptions on 28 advance shares; he never participated in profits or dividends. If there has been over-borrowing by the society the directors are liable, and not the society.

[De Villiers, C.J.: If that position is upheld it would dispose of the case, so it had better be argued first.]

Brice on Ultra Vires (3rd ed. p. 644) says that persons who have advanced moneys for a corporation, which moneys have been applied in payment of debts or otherwise devoted to the necessities of the corporation, are in equity entitled to be recouped by the corporation to the extent to which the advances have been so expended, and refers to *Re German Mining Company, ex parte Chippendale* (4 De G. M. and G., p. 19; also pp. 648—650): "A corporation is liable in respect of an *ultra vires* engagement only to the extent of the benefits it may have received therefrom."

[De Villiers, C.J.: In this case the money has been received.]

It has gone into the pocket of the secretary.

[De Villiers, C.J.: But as soon as it came into the pocket of the secretary it enured to the benefit of the society. It was their fault if they appointed a dishonest secretary.]

Brice (pp. 767-8); *Chaplea and wife* v. *The Brunswick Permanent Building Society* (6 Q.B.D. p. 696), is very much in point: That society was unincorporated, but its rules were certified under 6 and 7 Will. IV. c. 32. *In re Durham County Permanent Investment, Land, and Building Society* L.R. 12, Eq., p. 516 and p. 521); *Blackburn and District Benefit Building Society* v. *Cunliffe, Brooks & Co.* (29 Ch.D., p. 902) is also very much in point; the society was not registered under the Building Societies Act (37 and 38 Vict., c. 42); *In re Guardian Permanent Benefit Building Society* (23 Ch. D., p. 440); *In re West London and General Permanent Benefit Building Society*, (2 Ch. D., 1894, p. 352), Judgment of Wright, J., at p. 367. That society was under 8 and 7, Will. IV., c. 32; *Murray* v. *Scott* (9 Ap. Ca., p. 519). The society in question in this case is in the same position as a society formed under 6 and 7, Will. IV., c. 32, and not as one under 35 and 38 Vict., c. 42. The former Act merely says that there are such societies and leaves them to make their own rules. In this colony a society has grown up, making its own rules. In either case a person dealing with it must make inquiry. *Cross* v. *Fisher* (1 Q.B.D. 1892, p. 467). In the present case the borrowing power has been exceeded by £50,000. There is a *prima facie* case disclosed which calls on the liquidators to protect the shareholders. *Auld* v. *Glasgow Working Men's Building Society* (12 Ap. Ca., p. 197). The latest statute in England is 57 and 58 Vict., c. 47. As to borrowing powers, *Lindley on Company Law* (5th ed., pp. 186, 189, and 919); *Wurzburg on Building Societies* (pp. 89, &c.). There is no presumed rule as to borrowing, 6 and 7, Will. IV., c. 32, is silent on the point. *Wurzburg* (p. 91) quoting *Murray* v. *Scott* and referring to *Re Mutual Aid Permanent Benefit Building Society* (29 Ch.D., p. 182; 30 Ch.D., p. 434).

[De Villiers, C.J.: If there were no borrowing powers at all, I can understand that the society might not be liable, on the principle of the doctrine of principal and agent, but if there are some borrowing powers will that be so, even where the borrowing powers are exceeded?]

Creditors must look into the books to see if the powers are exceeded or not. *Wurzburg* (pp. 95, 96); quoting *Ex parte Watson* (21 Q.B.D., p. 301). If there are powers of borrowing they must be strictly observed and not exceeded.

[Laurence, J.P.: How can lenders know whether the amount has been exceeded the amount varies from time to time?]

They can see the list of mortgage bonds in the Deeds Office, and can also make inquiries of the secretary, and lend or not at their discretion. Even if their soceity is a partnership it is an anonymus partnership; there is no list of shareholders open to the public, and the shareholders vary from time to time; a shareholder may withdraw at any time. A depositor does not give credit to any individual shareholder but to the society and can only go against the funds. See rule 67 as to the appropriation of moneys. The respondents have not had the benefit of the amounts borrowed. The creitor's remedy is by the doctrine of subrogation or alternatively against the directors. *Hill's Case* (9 Eq., p. 605); *Ex parte Watson* (21 Q.B.D.. p. 321). As to the position of advanced shareholders, *Wurzburg*, pp. 255, 260, 266; *Brownlie* v. *Russell* (8 App. Ca., p. 235); *Tosh* v. *North British Building Society* (11 Ap. Ca., p. 489); *Durham and Northumberland Working Men's P.B. Society* v. *Davidson* (61 L.J.Q.B., 478). The prospectus informs borrowers that they are free of the society if they pay down a certain sum in advance by way of cover. As to the anonymous partnership and liability of partners, *Watermeyer* v. *Kerdel's Trustee* (3 M., p. 424). Whether a call is to be made is entirely in the discretion of the Court. *Lindley on Company Law* (pp. 46, 420-423, 852, &c.); *Bargate and others* v. *Shortridge* (5 H.L.C., p. 297). Persons whose names ought to have been taken off the list of shareholders by the secretary, but remain there, are not liable. *Gay's Case* (1 De G.M. and G., p. 347); *Mowat and Elliott's case* (3 De G.M. and G., p. 254); *In re Worcester Corn Exchange Company* (3 De G.M. and G., p. 180).

[The remainder of the argument was based on the merits of the individual cases.]

Mr. Close: Slater was an advanced member and became such compulsorily; he received no dividend. He is not liable except as a partner *en commendite* up to £50. An advance member gets no share in the profits and takes no part in the interest. He only gets dividends if he pays more than the six-monthly subscription. Rule 63. As to calls and the amount thereof, Act 25 of 1892, section 161.

Mr. Solomon: The society is not registrable under Act 25 of 1892 and was erroneously registered thereunder. That Act deals with (1) companies existing at the date of the Act and (2) companies created after the Act. A company existing at that date can only be registered with limited liability if limited at that date by its own Act of Incorporation and not otherwise; sections 4, 5. In order to register as a limited company a company unlimited before the Act it must be dissolved and reconstructed. If this was an ordinary partnership before the Act it can only be registered with unlimited liability. The English cases quoted do not apply, inasmuch as they deal with societies established under Acts of Parliament, and those Acts give them the right to make rules, which rules are required to be certified and deposited in some public place and are then binding on all persons. That is so even in societies incorporated under 6 and 7 Will. IV., c. 35; if a society has by statute the right to make rules those rules have a statutory effect. Section 4 of 6 and 7 Will., IV., c. 32 makes 10 Geo. IV., c. 56 applicable. See sections 2, 3, 4, 7, 8 and 10 of the latter statute.

[De Villiers, C.J.: The English authorities say there is no partnership but that it is a matter of principal and agent; that doctrine does not appear to be founded on the statutes.]

The societies are creatures of the statutes and are regulated by statutory rules. Lord Halsbury laid down that they are not partnerships at common law but they are statutory partnerships. This society comes entirely within the definition of a partnership laid down in *Poppe, Russouw & Co.* v. *Kitching and others* (6 Juta, p. 307, at p. 314).

[De Villiers, C.J.: The profits are made from the members and not from outside persons, so how can it be a partnership?]

The members are joined together to carry on business for profit in a certain way. If there is a partnership the creditors have nothing to do with the nature of the partnership or the deed. Here however it had power to borrow money from outside to lend to the members. Besides this the memorandum of association gives power to purchase landed property, and to invest.

Rule 69. A joint-stock company is not a common law partnership. *Re The Paarl Bank in liquidation* (8 Juta, p 131, at p. 134). Depositors are not bound to inquire whether the borrowing powers have been exceeded; the limit placed to the powers is a private instruction to the directors.

[De Villiers, C.J.: In *Brownlee* v. *Russell* (8 App. Ca., p. 235), Lord Selborne also says that a Building Society is not a partnership.]

Lord Selborne says at p. 248 in that case, "we have nothing here to do with creditors, and nothing remains except to adjust the rights of the members *inter se*."

[De Villiers, C.J.: If this is not a partnership are the members liable to pay more than they have contracted to pay?]

No. The question then will be, how much have they contracted to pay? An unadvanced shareholder is bound to go on paying up to £50 a share. Therefore in liquidation he is liable for the balance of £50 unpaid.

[De Villiers, C.J.: He is only liable in monthly instalments.]

In re The Cordova Union Gold Co. (2 Ch. D. 1891, p. 580). That case was decided under section 102 of the Companies Act, 1862, which corresponds with section 161 of Act 25 of 1892. This is not the time to determine the liability of the directors, and the call should not be postponed until the liability is determined. *In re Contract Corporation* (2 Ch. App., p. 95).

There is nothing in the rules distinguishing between advanced and unadvanced shareholders, and it is the rules which are binding on the creditors and the members, not the prospectus. The onus of showing that any member has ceased to be a member lies on himself: he can only cease to be such by transfer, forfeiture, or withdrawal. The directors have no power to forfeit except in accordance with the rules: there is no compulsory forfeiture; the clause dealing with forfeiture is for the benefit of the company, and the power given must be exercised. *Moore and others* v. *Rawlins* (6 C.B. (N.S.), p. 289). None of the respondents claim to be struck off on the ground of having transferred their shares. As to withdrawal, rule 61 requires three months' notice to be given; none of the respondents come under this rule. Nothing in the rules provides that if everything is paid back to the society by a member, he thereby ceases to be a member. The prospectus does not form the contract between the parties, though it may operate as an inducement to contract: if the prospectus were relied on, and there were material discrepancies between the prospectus and the rules, that might have been a ground for repudiation by the shareholders if timeously made, but it is too late after receipt of dividends or after liquidation.

An advanced shareholder who has paid off his loan but still allows his subscription to remain in the books and not set off against the final payment is still a shareholder.

(The remainder of the argument was based on the merits of the individual cases).

Postea (October 26th).

De Villiers, C.J.: Before deciding whether any of the respondents should be placed upon the list of contributories to the debts of the society, it is important to ascertain its precise nature and the legal relations which its members bear towards each other and the outside world. Its name is the Cape of Good Hope Permanent Building, Land, and Investment Society, a name which at once betrays its origin. In England building societies were in existence before 1836, in which year an Act was passed for the regulation of such societies. The preamble to that Act recites that societies commonly called building societies have been established in different parts of the kingdom for the purpose of raising by small periodical subscriptions a fund to assist the members thereof in obtaining a small freehold or leasehold property, and that it is expedient to afford encouragement and protection to such societies and the property obtained therewith. The Act then proceeds to lay down the conditions upon which such societies may be established, and provides for the making of "such proper and wholesome rules and regulations for the government and guidance of the same as to the major part of the members shall seem meet." The earliest societies were all of the "terminating" class—that is to say, they were, according to their rules, to terminate at a fixed date, or when a result specified by their rules was attained. As opposed to the terminating class there was the class of "permanent" societies, which might continue their operations for an indefinite period. In this colony there is no statute for the regulation or encouragement of building societies, but their legality is recognised by the 17th schedule of Act 3 of 1864, which imposes a licence duty on "every building society, whether one having a capital stock divided into shares or not." The Act does not define the term, and consequently the only means of ascertaining its meaning is by reference to the law of England, where building societies had their origin, and from where the name, as well as the institution itself has been imported into this colony. The essential feature of every building society is that it is an association of persons subscribing to a common fund, which is to be employed in making advances to such of the members as desire to obtain them on the security of landed property. According to the original rules of the society with which the Court is now dealing its object (Rule 2) is "to make advances to members out of the funds of the society upon security of freehold or leasehold estate by way of mortgage." Subsequently the following addition was made to the objects of the society: "To receive money on deposit at interest, purchase landed property, erect buildings, and to do and perform all such acts as may be found necessary or conducive to the carrying out and attainment of the objects of the society." This addition, even if it were binding upon the respondents, does not in my opinion, affect the question of their liability as contributories. Under the original rules (No. 22) the Board of Directors already had "the power to borrow any sum for the purpose of the society to advance to their members, either from their bankers or any other source, not exceeding two-thirds of the amount secured to the society by mortgages from its members." They also had the power (Rule 71) "to receive deposits from shareholders and others of not less than 2s. 6d., upon which interest might be allowed." In England a society having all the powers enjoyed by the society now in question would still be held to be a building society. It would not be deemed to be a common law partnership, but the rights and liabilities of its members would depend upon the contract into which they have entered, and which is found in the rules of the society. What, then, is the precise status of such a society according to the law of this colony? Mr. Solomon, on behalf of the liquidators, says it is a partnership, and he relies upon the definition given in *Poppe* v. *Kitching* (6 Juta, 314). There it is said that "partnership is a consensual contract between two or more persons to place their money, goods, labour, and skill, or all or some of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions." It is added that "a subscription by two or more persons towards a common object does not constitute them partners, unless that object be, in whole or in part, the making of profit and the division of the profit between the subscribers." The object of a building society is to make advances to members on security of land, and the object of the advanced members, at all events, is to obtain such advances. As to the unadvanced members, they no doubt contemplate a profit from the interest paid by the advanced members, but it is difficult to hold that this fact alone constitutes them partners. In England and Scotland it has been repeatedly held that the contract does not constitute a partnership, and none of the decisions, as far as I can discover, is founded upon the circumstance that building societies are there regulated by statute. The decisions proceed upon the ground that the contract itself is not of such a nature as to establish a partnership. It is a contract *sui generis* which does not fall within any of the well-defined classes of contracts known to our law. Persons dealing with such societies know that they are English in their institution and constitution, and that the powers of the directors and the liabilities of the members are necessarily of a very limited nature. The directors are the agents of the members to carry out the rules of the society, and those rules furnish the only criterion by which the liability of the members *inter se* and towards outsiders can be ascertained. The *status* then of such a society in our law is that of an association of persons subscribing to a common fund for the assistance of one class of members by another class to the mutual advantage of both, and carrying on their business through the agency of a Board of Directors with certain limited powers, which powers persons dealing with the society must make themselves acquainted with. For the transaction of the necessary business of such an association some expenses must be incurred by the directors, and for the payment of such expenses all the members are personally liable. It is not, however, a necessary part of the business to borrow money. The rules provide for the contribution by the members themselves of funds to be lent to the advanced members. In fact, borrowing powers are conferred upon the directors, but those powers are limited, and cannot be exceeded so as to impose a personal liability upon the members to pay the excess. The rules which confer the borrowing powers are Rules 22 and 75. They authorise the directors to borrow money from their bankers or any other source, including the receipt of deposits from members and others, but the total amount thus borrowed cannot exceed two-thirds of the amount secured to the society by mortgage from its members. A strict observance of this rule would always prevent any recourse against the members personally, except in the improbable event of the property mortgaged depreciating to the extent of more than one-third of the amount secured. This brings me to the main defence raised by most of the respondents against the payment of any immediate call. The value of the assets of the society, according to the latest information supplied by the liquidators, is £57,472, consisting of mortgages by members for £44,972, and landed property taken over in many cases in payment of mortgages £12,500. The liabilities now appear to amount to £104,853. The amount which at the date of the liquidation could have been legitimately borrowed was £38,300; the amount actually borrowed was more than double that sum. The excess appears to have been caused by the secretary's defalcations from which the society itself of course derived no benefit. The costs of the liquidation, including law costs, will, I understand, be about £5,000. There are practically no ordinary outside creditors. The bulk of the creditors are loan creditors. In the payment of the costs of liquidation, the claims of ordinary outside creditors, and the loan debts to the extent to which they could be legitimately incurred, the existing assets of the society are amply sufficient. The important question to be decided is whether for the purpose of paying the loan creditors a call should now be made upon the members. After giving this matter consideration I have come to the conclusion that, with the information now before the Court, a call would not be justified upon the basis proposed by the liquidators. It may become necessary to make a call upon the advanced members for the balances due by them on their bonds, but that would be a call varying with the amount due by each member. Under their bonds the advanced members are entitled to pay their debts in instalments, but such a mode of payment would be quite inconsistent with the order for winding up the society. Before such a call is made the question will have to be considered by the liquidators whether they are entitled to claim more than the balances due by the advanced members after deductions of subscriptions already paid and discount, if any, to which the members might be entitled upon a voluntary redemption of their bonds. In regard to the members generally the question will also have to be considered whether, for the purpose of adjusting the rights of the members *inter se*, a call can be made for more than the subscriptions due by any member before the date of the winding-up order. At present it would be premature to express an opinion on these points. The information before us does not justify the Court in authorising any call. The members are entitled to rely upon rules which are expressly devised to protect them against personal liability, except in certain events which have not been proved to have occurred. If all the advanced members are prepared to redeem their bonds immediately—as those who have appeared in this case seem willing to do—there will be sufficient available assets without any call for the payment of the costs of liquidation, the claims of ordinary outside creditors in full, and loan debts to the extent of two-thirds or more of the amount secured by mortgage. The rule, therefore, for placing the respondents upon the list of contributories must be discharged with costs.

Laurence, J., said: This society having been placed in liquidation by order of the Court, on the petition of the chairman and directors, the present application, by the official liquidators, is for settling the list of contributories, for leave to make a call of £20 per share, and for certain other orders and directions for the conduct of the liquidation. The case is not only of great importance to many individuals and, should it be necessary to go into them, of much complication and variety as to the circumstances and particulars of individual cases, or groups of cases, but involves legal questions of considerable difficulty and, so far as our Courts are concerned, in no way covered by authority or precedent. More or less similar cases, however, have been, it might be said, of painfully frequent occurrence in the English Courts; and as the basis, the rules, and even the title of the society are clearly derived from English models, the decisions in those cases and the principles laid down, being *in pari materia*, are obviously of great weight and afford much assistance in dealing with the various questions which have been raised. From the information before the Court it seems, after adding to the other liabilities the estimated cost of liquidation, the realisation of the assets of the society will probably leave a deficit of something over £50,000. The present application is based on the assumption that this loss must be met by the members, and the decision must depend upon the view taken by the Court of the nature of the society, the resulting liabilities of its members, and the rights of the various classes of creditors. As to the first point, I must admit that I approached the question under the impression that the society must be regarded as a partnership, and in the absence of any effective registration under the Companies Act, one of unlimited liability. But a closer examination of the nature and objects of the society, and of the cases and authorities cited, has satisfied me that, as it has been put, such a society is an organisation *sui generis*, not embracing all the essentials of an ordinary partnership, and not so constituted as to render the individual members liable *in solidum* for all debts incurred. It is true that money was borrowed from outside sources, and lent to some of the members at higher rates, and profits were thus made which were distributed among the members. The memorandum of association of 1897 mentions, indeed, as the first object, "receiving money on deposit at interest"; but the old rules provided "that the object contemplated is for making advances to members out of the funds of the society upon security of freehold or leasehold estates by way of mortgage" (clause 2), while clause 22 gave the directors "power to borrow any sum for the purpose of the society to advance to their members, either from their bankers or any other source, not exceeding two-thirds of the amounts secured to the society by mortgages from its members," and clause 2 of the new rules, under the title "object," contains somewhat similar provisions. The main object of such societies seems to be in theory to encourage thrift, to facilitate the acquisition by members of landed property on what appears to be easy terms of payment, which may be spread over a long period, and to provide a channel for the investment of small sums which, if the management is honest and competent, should be fairly secure and afford a good return to the investor. The society is not one for carrying on any trade or business, it is not an ordinary commercial venture or enterprise, conducted with a view to profit and with the risk of loss. Persons lending money to the society must have known that there was no register of shareholders, and that shares were subject to extinction or withdrawal, and I do not think they can be said to have looked, or to be enabled to look, to the credit of the individual members as liable for the sums so advanced beyond the obligations contracted by them under the rules. The society, in fact, seems to be in the same position as an English unincorporated society —that is, a society not registered under the Act of 1874—and the fact that in England under the older statute the rules had to be approved by a barrister, or more recently by the Registrar of Friendly Societies, seems to make no material difference or essential distinction in this respect. The obligations of members must therefore be held to be limited by their contract and by their liability for the acts of the directors as their agents. With regard to the advanced members—those who took shares with a view to obtaining and did obtain an advance on security—the system was that they were required to take shares to the nominal value of the loan, to pay certain instalments thereon, and to redeem the loan within a certain period, and this, as I understand, they might do either by cash payments or by gradually paying up the full value of their shares which could then be set off against the loan. In fact, as it was put by Lord Watson in *Brownlie* v. *Russell*, an advance in such cases "does not mean a loan by the society upon the security of the shares; it signifies this, that the society pay to the member by anticipation the amount of his shares upon receiving in return certain considerations which are fixed by the rules (8 A.C., p. 256). As a result of this case and that of *Tosh* v. *North British B.S.* (11 A.C. 489) it was held in the subsequent case of the *London Provident B.S.* v. *Morgan* (2 Q.B.B. 1893, 266), that in the event of liquidation advanced members could be called upon to pay up the advances due on their loans immediately—or at all events on a notice from the liquidators, similar to that which they would themselves have had to give in redeeming under the rules (see rule 58)—but less any discount to which they would be entitled upon voluntary redemption under the rules—and that on payment of such sum they would be free from all further liability. By the latest English Statute, that of 1894, advanced members of incorporated societies are only liable to pay at the times and subject to the conditions enforced in the rules; but in a society such as the present, the rule laid down above seems to apply, for the reasons and on the principles of the cases cited, and others referred to in Wurtzburg's Treatise on the Law of B.S. at pp. 270, 271. With regard to the unadvanced members, it has been held on similar grounds, which I think are equally applicable to the present case, that their liability is confined to the payment of the amounts due on their shares under the rules of the society; see *e.g. Re West London Society* (2 Ch. D. 1894, 352). In that case, a call in fact was made, but this was to meet the expenses of liquidation, and certain claims of ordinary outside creditors, as distinguished from loan creditors, for which members are held liable on another principle, as explained by the Chief Justice. In the present case, it is clear that the estimated costs of liquidation and any such special claims can be defrayed out of the assets of the society, and it would seem that the real question will ultimately be, not as to a call, but as to the disposal of the remaining assets. *Prima facie*, the loan creditors would appear to be entitled to a *pro rata* distribution of such assets; but a serious question has been raised with regard to the very large amounts which appear to have been borrowed in excess of the powers of the society for that purpose. I must say that the authorities seem very strong on the point that such sums cannot be recovered from the society itself—of course I say nothing about the possible liability of any parties not before the Court—unless it can be proved that they were expended for the purposes of the society, or possibly in some instances on the principle of subrogation. The question of the rights of the loan creditors, both *inter se* and between themselves and the members, may at a future stage require the careful attention of the liquidators, and their adjustment may involve a minute and troublesome analysis of the state of the accounts at various periods. Any discussion of this matter at present would, however, be clearly premature. Practically the only question for immediate decision is that of the call, and, on the facts before us, I think the applicants have failed to show that at the present time to impose a call is either necessary, expedient, or legitimate. I may perhaps add that, after consultation with the Chief Justice, and on his suggestion, I had partially prepared this judgment before I had the advantage of seeing the way in which he proposed to put his view of the case. In that view I fully concur, and it would probably have been almost sufficient for me to simply express such assent; but in view of the exceptional nature of the case I thought it might perhaps be not altogether a work of supererogation for me to express concisely the reasons which have led me to a similar conclusion.

Mr. Close mentioned that three of the applicants had requested that their names should be altogether struck off the list of contributories.

De Villiers, C.J., said that the Court were not prepared to strike anyone off just yet; at present there was no one authorised to be placed on the list of contributories.

[Attorneys for the liquidators, Messrs. Sauer & Standen; Attorneys for the majority of the Respondents, Messrs. J. & H. Reid & Nephew, Van Zyl & Buissinne, C. C. Silberbauer, J. C. Berrangé & Son, and Fairbridge, Arderne & Lawton; Attorney for Respondent Slater, C. J. Trollip; Attorney for the Directors, Paul de Villiers.]

SUPREME COURT

[Before the Right Hon. Sir J. H. de Villiers, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice Maasdorp, and the Hon. Mr. Justice Solomon.]

ADMISSIONS. { 1898. Nov. 1st.

Mr. McGregor moved for the admission of Herman Johan Neethling Dempers as an attorney and notary of the Court.

The order was granted, and the oath administered.

Mr. Benjamin moved for the admission of Maurice Edward Rood as an attorney, notary, and conveyancer.

The order was granted, and the oath administered.

Mr. Benjamin moved for the admission of Daniel Mills Dyason as an attorney and notary.

The order was granted, and the oath administered.

Mr. Benjamin moved for the admission of Francois Daniel Changuion Moorrees as an attorney and notary.

The order was granted, and the oath administered.

Mr. Benjamin moved that Mr. Fuller be admitted as a conveyancer.

The order was granted.

PROVISIONAL ROLL.

LARMER V. VENTER AND ANOTHER.

Mr. P. Jones applied for provisional sentence for £450, upon a mortgage bond, with interest at the rate of 6 per cent., and also that the property specially hypothecated be declared executable.

Provisional sentence granted as prayed, and the property specially hypothecated declared executable.

LE SUEUR V. BIRD.

Mr. Buchanan applied for provisional sentence for £293, due upon certain conditions of sale with interest at the rate of 6 per cent.

Provisional sentence granted.

MASTER V. WALTHER AND ANOTHER.

Mr. Sheil asked for the usual order calling upon defendants to file an account as executors.

Granted.

MARSH V. BURGER.

Mr. Benjamin moved for provisional sentence for £400 due upon a mortgage bond, together with interest from August 1, 1896, and that the property specially hypothecated should be declared executable. The bond had become due by reason of the non-payment of the interest.

Granted.

TROLLIP V. COLLINS.

Mr. Close applied for provisional sentence for £75 due upon a promissory note, with interest and costs.

Granted.

ILLIQUID ROLL.

DE SMIDT V. TRUTER AND OTHERS.

Mr. Benjamin applied for judgment, under Rule 329D, for £37 10s., being for survey work done and diagrams supplied. He also asked for an order attaching such moneys remaining in the hands of the High Sheriff, (being proceeds of property sold in the suit of G. Montgomery Walker against the defendant) after satisfying the claims of the said G. Montgomery Walker, as should be required to satisfy the claims of the present plaintiff.

Counsel referred to *MacIntosh* v. *Botha* (13 S.C.R., p. 8).

The application was granted.

TOWN COUNCIL V. LALIE SOEKER.

Mr. P. Jones applied for judgment, under Rule 329D, for the sum of £49, amount due for municipal rates, with costs.

Granted.

TOWN COUNCIL V. J. J. JOHNSTONE.

Mr. P. Jones moved, under Rule 329D, for judgment for the sum of £21, for municipal rates due.

Granted.

HENDRICKS V. H. HUSSAN.

Mr. Buchanan applied, under Rule 329D, for judgment for £800 due upon certain landed property bought by defendant from plaintiff on a certain broker's note, with interest from October, 1898, and costs of suit.

Order granted.

J. G. STEYTLER AND CO. V. SCHMAL AND CO.

Mr. Jones moved for judgment against defendants, jointly and severally, under Rule 329, for the sum of £240 8s. 5d. for goods sold.

Order granted.

FINDLAY AND CO. V. D. MATCHAM AND CO.

Mr. Jones moved for judgment in terms of a consent paper, in which the defendants jointly and severally confessed judgment for the amount claimed in the declaration.

Order granted.

REHABILITATIONS.

Mr. Joubert moved for the rehabilitation of Solomon Steyn and William Millin, formerly trading together.

Order granted.

GENERAL MOTIONS.

IN THE ESTATE OF THE LATE GERHARDUS JOHANNES JACOBUS DEYSEL.

Mr. Buchanan moved for leave to raise a certain sum of money on second mortgage to pay off the unsecured debts due by the estate. There was one minor child, and the Master reported favourably upon the application.

The Court granted the application on the condition that petitioner should pay the interest on the proposed bond.

COLONIAL GOVERNMENT V. MANUEL.

Mr. Sheil, Q.C., applied for leave to sue by edictal citation for the cancellation of a certain title deed. Petitioner was unable to find the whereabouts of the respondent Manuel, who was last heard of in the district of Maclear in East Griqualand.

The Court granted the application, the order to be returned on the last day of term, one publication in the "Kokstad Advertiser" and one in the "Government Gazette." Leave was also given to attach the property *ad fundandam jurisdictionem.*

IN THE MATTER OF THE PETITION OF SIGIDI LUMKU, OTHERWISE KNOWN AS DLENGELELANA.

This was an application for an order authorising the Registrar of Deeds to enregister certain land in the district of Glen Grey in the name of the petitioner as the heir, according to native usage and custom, of his deceased father Dalingozi.

Mr. Close appeared for the petitioner and referred to *Re Mahonga* (6 Juta, p. 317) and *In re Kulu* (7 Sheil, p. 123).

The Court granted a rule *nisi*, returnable on the last day of term, calling upon all persons to show cause why the property should not be transferred to the applicant.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

BURGER V. BURGER.

Mr. Close applied for leave to the applicant to sue by edictal citation for restitution of conjugal rights.

The Court granted the application, the rule to be returnable on the last day of term, personal service to be effected, and the intendit and notice of trial to be served with the citation.

DAVIDS V. MENDELSOHN. { 1898. Nov. 1st.

Appeal—Magistrate's Court—Reasonable time to prosecute.

Where five months had elapsed between the date of a Magistrate's Court judgment, and the day of hearing an appeal from that judgment, the Court held *that the delay was not so unreasonable as to justify a discharge of the notice of appeal.*

This was an application for an order discharging a notice of appeal from a Magistrate's Court judgment by reason of appellant's failure to prosecute the said appeal within a reasonable time.

The judgment which was appealed from had been delivered on the 8th June last, and notice of appeal given on the 9th June. On the 12th October the appeal had been set down for hearing to-day. On the 26th October the defendant gave notice that application would be made to the Court to discharge the notice of appeal. Appellant could not himself be found, and the notice was served on his attorney and on the agent who represented him in the Court below, but they had both refused to accept service.

Mr. Graham, Q.C.. for the applicant: *Rymer* v. *Solomon* (2 Sheil, p. 350); *Harris* v. *De Waal* (5 Sheil, p. 414); *Priestly* v. *Dunmeyer* (*supra* p. 324).

Mr. Close for the respondent: In *Rymer* v. *Salomon* and also in *Rowsell* v. *Staller* (12 S.C.R., p. 399) a very long period had elapsed.

Mr. Graham: In *Rowsell* v. *Stadler* the case had been actually set down for trial and yet the appellant was barred.

The Court refused the application.

De Villiers, C.J.: I do not think it was intended in the cases quoted by counsel that a hard and fast rule should be laid down by which a respondent should be entitled to apply to the Court to bar an appeal. In the case last quoted, *Rowsell* v. *Stadler*, eighteen months had elapsed after judgment, and the Court held that there was such unreasonable delay there that although the appeal had been set down for hearing it was still open to the respondent to apply to the Court to bar the appeal. In this case only five months have elapsed, and this does not seem a delay so unreasonable as to justify the Court in barring the respondent from bringing his case to a hearing. Under all the circumstances the Court will not grant the application. As to the costs of this application, that question will be reserved until we have an opportunity of knowing the merits of the case. The present application is therefore refused; the question of costs of this application is reserved.

Maasdorp, J., and Solomon, J., concurred.

[Applicant's Attorney, D. Tennant; Respondent's Attorneys, Messrs. Innes & Hutton.]

MARSHALL V. AFRICAN BANKING CORPORATION.

Mr. McGregor applied on behalf of defendants for the appointment of a commissioner to take certain evidence and for the postponement of the trial.

Mr. Buchanan appeared for the respondent (plaintiff in the action).

As an exception had been filed to the declaration, the application was ordered to stand over until the argument on the exception had been heard.

IN THE ESTATE OF THE LATE WILLIAMS VALENTINE ALEXIUS EDWARDS.

Mr. Close applied for an order authorising the transfer of certain property to the executor.

The Court granted the application.

GOLDMAN V. GOLDMAN.

Mr. Buchanan moved that the rule *nisi* for leave to sue *in forma pauperis* for restitution of conjugal rights be made absolute, and for leave to sue by edictal citation, and to serve intendit and notice of trial at the same time.

Granted.

IN THE MATTER OF THE PETITION OF ANNIE SOPHIA SMITH.

Mr. Graham, Q.C., applied that a rule *nisi* under the Derelict Lands Act be made absolute.

Mr. Joubert appeared to oppose on behalf of one Versfeld. It was stated on affidavit that a meeting of next of kin had been called for to-day in the estate of one Martin, in whose name the property in question was registered and respondent hoped to be appointed executor dative.

The Court ordered the matter to stand over until the rule had been served upon the executor dative appointed at the meeting, when the matter could be again brought forward.

IN THE MATTER OF THE PETITION OF PIETER JACOBUS ANDREAS MEINTJES.

Mr. P. Jones applied for a rule *nisi* under the Derelict Lands Act to be made absolute.

Order granted.

PETITION OF JOHN PETER WILDREDGE.

Mr. Upington moved that the rule *nisi* granted under the Derelict Lands Act be made absolute.

As proof of the publication of the rule in the "Kokstad Advertiser" had not been obtained, the matter was ordered to stand over.

Ex parte HOLDSTOCK'S EXECUTOR.

Mr. Benjamin moved, on behalf of Thomas O'Brien, of Port Elizabeth, as executor testamentary of the estate of the late Thomas Leonard Holdstock, that the rule *nisi* granted under the Derelict Lands Act be made absolute.

Granted.

SEARLE AND SON V. ARKELL AND DOUGLAS.

Mr. McGregor moved that the rule granted to attach certain property to found jurisdiction be made absolute, but not in the form originally granted, an undertaking having been given to the respondents that only the office furniture would be attached.

The order was made absolute as prayed.

IN THE ESTATE OF THE LATE JAMES SEARIGHT.

Mr. McGregor moved for an order authorising the transfer to one of the executors of certain property belonging to the estate and sold to himself.

The Registrar of Deeds reported that the sale was a *bona fide* one and the price a fair one, but he had rejected the deed of transfer as he considered he had on discretion.

The order was granted.

IN THE MATTER OF THE PETITION OF ANNIE LYNCH.

Mr. Benjamin moved that the rule authorising the Registrar of Deeds to issue certified copy of a certain mortgage bond be made absolute.

Granted.

Ex parte O'CONNOR.

Mr. Buchanan applied for leave to the petitioner to sue his wife *in forma pauperis* for divorce by reason of her adultery.

The petitioner appeared in court, and, said that he was a shunter, and his wages were 6s. per day.

De Villiers, C.J. : And yet you want to sue *in forma pauperis?* I think you had better save a little money out of your wages, and bring an action in the ordinary way.

The application was refused.

STIGLINGH V. RHODES. } 1898. Nov. 1st.

Default -Removal of Bar—Leave to plead.

This was an application by the defendant for the removal of bar and leave to plead. The action was for libel and summons had been issued on the 12th September. The declaration was filed on the 6th October; no plea having been filed on the 15th October, notice to file plea was given to the defendant. On the 17th October, the defendant's attorney wrote to the plaintiff's attorney that he was unable without prejudice to the interests of his client to file his plea for a few days as it required careful consideration. The affidavit of the defendant's attorney now put in stated that the plea would be ready in the course of the week and would be filed by 8th November.

Mr. Graham, Q.C. (with him Mr. Innes, Q.C., and Mr. Sampson, Q.C.), appeared for the applicant.

Sir H. Juta, Q.C., for the respondent.

[Maasdorp, J. : Rule of Court 26 requires an affidavit of the merits. Have you gone as far as that?]

Mr. Graham : We have filed the usual affidavit. We have had reasons for not filing the plea earlier but they cannot be disclosed without prejudicing the defence.

De Villiers, C.J. said : The Court has a very wide discretion in allowing parties in default to purge their default, but I have never known a case in which so little ground has been shown for there being any default at all. The declaration was filed as far back as October 6, and it does seem that there has been ample time to file any plea which could in the circumstances be expected to be filed. At the same time I do not remember any case where a defendant has come forward and saidthat he would probably have a good defence where the Court has refused to allow him to put forward that defence. In the present case there is such a statement, and I am not prepared now to deny the defendant the opportunity of raising that defence. The Court will therefore allow him to file his plea, but he has to do so within forty-eight hours. If after that is done it is found necessary to amend the plea, it will be competent to apply to the Court again for power to amend it. The Court will make the order in the present application on condition that the costs of the application and all costs occasioned by the postponement be paid by the defendant.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorney, V. A. van der Byl.]

SONNENBERG V. HAARHOFF AND FINCHAM. { 1898. Nov. 1st.

Election Petition—Day of hearing.

Application to expunge certain allegations in petition and file counter charges.

This was an application by the petitioner for a day to be fixed for the hearing of an election petition lodged by him against the return of the respondents as members of the House of Assembly for the division of Vryburg. The said petition had been lodged lodged upon the 21st October.

The respondents made a cross application :

1. For an order to expunge sub-sections (*d*) and (*e*) of section 5 of the petition together with the annexures marked D and E.

2. For an order requiring the petitioners to file and furnish more detailed particulars in respect of the charges made in sub-section (*c*) of the said section 5 than are contained in Schedule C annexed thereto.

3. For an order declaring that the respondents are entitled to file counter charges and lead evidence to prove that the applicant is not entitled to the seat which he had claimed for himself and his late colleague, De Villiers.

The petitioner's attorney filed an affidavit stating that in view of the expense which would have to be incurred and in order to prevent delay in the hearing he was prepared to withdraw sub-sections (*d*) and (*e*) of section 5, and the annexures D and E.

He said further that the petitioner did not claim the seat either for himself or for the late Mr. De Villiers.

The sub-sections referred to were as follows:

(*d*) Certain persons who had no qualification to be placed upon the register of those residing in the electoral division of Vryburg and qualified to vote in the election of members for the Parliament of this colony were wrongfully and unlawfully placed on the said register, and did wrongfully and unlawfully vote at the said election.

Your petitioner annexes hereto a schedule, marked D, giving particulars of those persons whose votes were wrongfully and unlawfully recorded as above stated.

(*e*) Certain voters wrongfully and unlawfully voted more than once at the said election, particulars of which wrongful and unlawful acts are contained in the schedule hereto, marked E.

Sub-section (*c*) was as follows :

The said Fincham and Haarhoff, by themselves, or by other persons on their behalf, gave or agreed to give, or offered or promised to procure or to endeavour to procure money or valuable consideration to or for certain persons, in order to induce such persons to commit the offence of personation and vote at the said election, and did so far as certain of the said persons are concerned corruptly give or procure such money or valuable consideration on account of such persons having committed the offence of personation, and having voted at the said election. Schedule C, annexed, set out the names of 78 persons said to be bribed and paid 10s. each by certain named agents of the candidates to personate certain registered voters and to vote. The names of the persons personated were in almost all the instances said to be unknown.

The petitioner asked to be allowed to supplement these charges at a later date.

Mr. Molteno appeared for the petitioner.

Mr. Graham, Q.C. (with whom was Mr. Sampson, Q.C.) for the respondent.

Mr. Molteno referred to Act 9 of 1883, section 16. The petitioner does not claim the seat, and section 43 provides that only in such case can counter-charges be made. As to Schedule C, no further allegations can be made.

[De Villiers, C.J.: Is it of any use to show personation unless you allege that it took place with the knowledge and consent of the parties?]

The parties are responsible for personation with the knowledge and consent of their paid agent, and that is alleged.

Mr. Graham : The respondents were justified from the form of the prayer in believing that the seat was claimed by the petitioner. No particulars are given as to the addresses of the personators or of the names under which they voted. In *Krige* v. *De Waal* (4 Sheil, p. 136), the Court allowed a month between the date of lodging the petition and the hearing.

Mr. Molteno said that the persons named in Annexure C would be called as witnesses.

De Villiers, C.J.: An application has now been made on notice to fix a date for the hearing of this petition, and there is a counter-notice to the effect that the respondent will apply first for an order to expunge sub-sections (*d*) and (*e*) of section 5 together with the annexures. Schedule D gives the names of those persons who voted at the election, and were not duly qualified to do so by reason of being registered under the salary or wages qualification, and not having been resident in the electoral division of Vryburg at the time the registration of voters took place. I am not surprised that Schedule D has been withdrawn considering the stringent provisions of the fifth section of the Constitution Ordinance, which provides that the list of registered voters shall be deemed as the conclusive proof of the right to vote of every person inserted therein. Then in regard to Schedule E, that relates to voting twice, and inasmuch as the applicant does not claim the seat for himself he has withdrawn that schedule also. Then the respondents pray for an order requiring the petitioner to furnish more detailed particulars in respect to the charges made in sub-section (*c*) of section 5 than are contained in the section with the annexures thereto. I have looked carefully at Schedule C, and I confess that I cannot see how further particulars can be given than what are here amply stated. After setting forth the charges, the names of the seventy-eight persons are given, and also the names of the persons by whom the money was paid. Now the Court has been assured on behalf of the applicant that all those persons here mentioned are to be called as witnesses, and I understand therefore that no charges will be taken except in the case of those witnesses who will be called. There is no precedent for compelling the applicant in an action to furnish the other side with the addresses of the witnesses whom it is intended to call. There seems to be no objection to the form of Schedule C, and therefore this part of the application cannot be complied with. The first order must be granted, viz.: to expunge sub-sections (*d*) and (*e*) and the annexures thereto. The third application, that the respondents are entitled to file counter-charges, should not be granted, considering that the applicant withdraws his claim to the seat, or rather states that he never made such a claim. The only thing now to be done is to fix a day for the hearing of this election petition. Mr. Graham says ample time should be allowed the respondents to prepare their case. That is undoubtedly very important, but we think that if time is given until December 19, that would be sufficient. The Court will, therefore, fix December 19 as the date for the hearing of the petition. As to the costs of this application, they may fairly be costs in the cause.

Maasdorp, J., and Solomon, J., concurred.

Mr. Graham asked what order would be made with regard to the further charges that it was stated might be made by applicant. He asked that a day be fixed as the latest date on which such could be received.

Mr. Molteno said that so far as he knew there were no further charges at present, but such might come up at any time, which it was important should come before the Court.

De Villiers, C.J., said the Court could hardly fix a date, but if such charges were put off too long the Court would protect the respondents, and not entertain the charges.

[Petitioner's Attorney, V. A. van der Byl; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

KLEYN V. BEYERS AND DEMPERS. } 1898. Nov. 1st.

This was an application by the petitioner for a day to be fixed for the hearing of an election petition lodged by him against the return of the respondents as members of the House of Assembly for the division of Caledon. The petition had been lodged on the 26th October.

Sir H. Juta, Q.C. (with whom was Mr. Innes, Q.C.), appeared for the petitioner.

Mr. McGregor for the respondents.

De Villiers, C.J., said: It is impossible to close one's eyes to the fact that these election petitions are of the utmost importance to the country. and I am expressing the views both of myself and my colleagues in saying that if possible they should be heard before five judges. Possibly some such arrangement cannot be made but if it can be done and five judges hear these petitions, it will be a great satisfaction to the Supreme Court Bench. It will be quite impossible to have five judges unless those petitions are taken after December 15, and that was one of the reasons the Court had in fixing December 19. as the first day for hearing the petition from Vryburg. That petition was likely to take considerable time, and therefore it would be January before the next case can be heard. The Court is of opinion, therefore, that Wednesday, January 6, should be fixed for the hearing of this case. Costs of this application will be costs in the cause.

Maasdorp, J., and Solomon, J., concurred.

De Villiers, C.J., said: There was an arrangement made some years ago with the Attorney-General by which should the Chief Justice consider any case of sufficient importance to require a bench of five judges, then every convenience would be given for the bringing of two extra judges from other parts.

[Petitioners' Attorney, Paul de Villiers; Respondents' Attorneys, Messrs. Dempers & Van Ryneveld.]

CREWE V. BOTHA. { 1898. Nov. 1st.

This was an application by the petitioner against the return of the respondent as a member of the House of Assembly for the division of Aliwal North, asking that dates might be fixed:

(*a*) Up to which the applicant might be entitled to furnish further particulars.

(*b*) Within which the respondent would be required to furnish and file the particulars of any counter-charges he might have.

(*c*) A date for the hearing by way of special case of the legal question whether in view of the provisions of section 50 of the Constitution Ordinance or other law evidence could be led in support of the objections set forth in clauses 1 and 2 of Schedule A accompanying the petition and other preliminary legal questions.

(*d*) A date for the recounting of the ballot-papers with full inspection of the rejected ballot-papers, and of such counterfoils as might be necessary to verify the marked list of voters, in order to test the apparent cases of double voting and clear up other ambiguities.

Mr. Graham, Q.C., appeared for the applicant.

Mr. McGregor for the respondent.

The Court fixed the 10th November for the hearing of the following argument:—"Whether, assuming that the facts stated in clauses 5 and 6 of the election petition and clauses 1 to 4 inclusive of Schedule A be correct, the objections thereby raised are valid in law."

[Petitioner's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorney, V. A. van der Byl.]

DE WAAL V. SIVEWRIGHT. { 1898. Nov. 1st.

This was an application by the petitioner for a day to be fixed for the hearing of the petition lodged by him against the return of the respondent as a member of the House of Assembly for the division of Stellenbosch.

Mr. De Waal appeared for the petitioner.

Mr. Graham, Q.C., for the respondent.

The Court fixed the 10th January as the day of trial.

[Petitioner's Attorney, V. A. van der Byl; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice SOLOMON.]

JACOBSON V. CITY TRAMWAY COMPANY. { 1898. Nov. 2nd. " 3rd

Tram-car—Negligence—Damages

Where the plaintiff was in the act of mounting a tram-car, and had one foot on the step but before he had time to lift the other foot was thrown to the ground owing to the tram moving off suddenly, the owners of the tram-car were held liable for the injuries sustained by the plaintiff.

This was an action in which the plaintiff claimed £800 damages for injuries sustained by him owing to the negligence of the servants of the defendant company in starting one of their tram cars as he was in the act of jumping on it.

The defendant company denied liability on the ground that the plaintiff had sustained the injuries complained of through his own negligence in mounting the tram while it was in motion.

Sir Henry Juta, Q.C. (with whom was Mr. Buchanan), appeared for the plaintiff.

Mr. McGregor (with whom was Mr. Upington), for the defendant company.

For the plaintiff the following evidence was given:

James Carnel, said that he was formerly a shopkeeper in Sir Lowry-road, but had given up business. On June 20, he was travelling by the tram from Cape Town to Sir Lowry-road; he was not quite sure of the time; it was about two o'clock or 2.30. Witness was standing at the back of the platform near the steps. He remembered the tram stopping at a spot between the Castle and the Early Market. He believed it was at the corner of Tennant-street. He did not see anybody signalling for the tram to stop. When the tram stopped, he saw a lady, whom he did not know, and two men prepare to get on the car. [Witness recognised in court, the plaintiff and a man named Marshall as the two men.] The lady got in first, and then Marshall, and after him the plaintiff, who caught hold of the rod, and put his right foot up. The car moved off with a jerk before the plaintiff had an opportunity to put up his left foot, and he fell down.

By the Court: Plaintiff's right foot was already on the step, and he was holding the rod with his right hand.

Examination continued: At that time the guard was on the top of the car collecting tickets. After plaintiff fell he remained on the ground, and someone signalled for the car to be stopped, which was done four or five yards away. The guard and other people got down and plaintiff was attended to. The plaintiff was not trying to get on the car while it was in motion. Witness came to give his evidence owing to a Mr. Abrahams, who was on the platform at the time of the accident and knew witness.

Cross-examined: The tram was crowded' and there were a number of people on the platform. Witness did not notice whether there was anybody between him and the steps. Plaintiff put his foot up near witness. Witness could not tell what the plaintiff had in his left hand, although when he was on the ground witness saw a black bag lying near him. The lady was standing on the platform at the time the car started, but he did not see whether she stumbled or not.

Dr. John Francis Dixon, stated that he was on top of a tramcar on June 20, and saw the plaintiff and two other persons waiting for the tram. The car stopped, started, and then stopped again almost immediately, and witness saw the plaintiff lying on the road. The platform was crowded, but there were one or two seats vacant on the top. Witness saw plaintiff, who appeared to be in great pain, and witness sent for the ambulance. Witness did not examine the plaintiff, but judged that he was suffering from a fracture near the groin.

Cross-examined: When plaintiff was waiting for the tram he had a black bag in his hand. The bag was heavyish.

Re-examined: The bag was not too heavy to prevent a man getting on the tram if it were standing still.

Joseph Marshall, a tailor, said he had assisted plaintiff in his business. On June 20 he and plaintiff were waiting for a tram He believed plaintiff gave the signal for the tram to stop, which it did, and a lady got on the tramcar, followed by witness and plaintiff. As soon as witness got on the second step he made room for plaintiff. He saw plaintiff put his right foot on the step, and as he was lifting his second foot the tram went off with a sudden jerk and plaintiff fell. Witness was positive that plaintiff did not attempt to get on the tram while it was in motion. From what witness had seen of plaintiff's business, it was flourishing. Plaintiff then lived in a fine furnished house in Roeland-street, but now he lived in one room in Canterbury-street. Plaintiff used to collect from £20 to £25 a week. It was a business requiring an active man.

Cross-examined: Witness was not in plaintiff's employ, although he used to help him sometimes when he had nothing else to do. Witness was not his clerk, and had not seen his books, but had assisted him in collecting and had seen the amount he collected. He never received any remuneration from plaintiff. The business was a tea and coffee business. He bought the tea and coffee wholesale, packed it into bags, affixed his own labels, and took the packages round to his customers. It must have been plaintiff who signalled, for witness did not see the lady do so.

H. Abrahamson stated that he was on the tram in question on June 20. He was standing on the platform at the back. He corroborated the evidence of previous witnesses as to plaintiff falling off the tram. Plaintiff did not attempt to jump on the tram while it was in motion.

Cross-examined: He did not see anyone signal for the car to stop. The car started with a special jerk.

H. Kaplan stated that he was a commercial traveller to the plaintiff for five weeks. He left plaintiff's service in May. Plaintiff's profit used to be from £10 to £12 a week. Witness saw the accident. Plaintiff did not attempt to get on the tram while it was in motion.

Dr. Fismer stated that on the evening of June 20 last he was called in to attend to the plaintiff, whom he found in a very excited state, and complaining of pain in his head and hip. Witness treated him for concussion of the brain. The hip was dislocated, and on June 22 witness called in Dr. Hewat for the purpose of assisting him to put the hip right. From June 25 until July 3 Dr. Hewat attended plaintiff, witness being away. On July 25 witness called in Dr. Petersen, and had a consultation with him. Plaintiff was confined to bed for four or five weeks, and then he made his first attempt to walk with crutches. Witness advised him to try massage. Plaintiff still complained of pain when he tried to put his foot down or bend the joint. He also complained of headache. Plaintiff was a neurotic subject and naturally this accident would have had a bad effect on him. The worrying over business and the lawsuit would aggravate the case. Witness hoped that after that was over plaintiff would get better. He had thought that in July he would be better, but that did not turn out to be the case. On October 23 witness put plaintiff under chloroform, and on examining the hip found it in a perfectly normal state. The full amount of the medical charges was £29 12s.

By the Court : Witness must believe plaintiff when he said he had pain. Although the hip was in perfect condition, the pain might be caused by some muscular or nervous affection.

Cross-examined : Witness believed it would be better for Jacobson if he gave up the crutches and exercised the leg. Plaintiff was too timid, and had not the confidence to give up the crutches, and that retarded perfect recovery. Witness was not of opinion that this would be a permanent injury.

Re-examined : Witness could not say how long it would be before plaintiff would be perfectly recovered.

Dr. Hewat gave corroborative evidence.

Edgar R. Eily, bookkeeper in the employ of Messrs. Lawrence & Co., said that the plaintiff had opened an account with the firm. Between April 12 and June 20 last he bought between £40 and £50 worth of tea.

Jacob Jacobson, the plaintiff, said that in June last he was carrying on business in a house in Roeland-street. He paid £7 10s. a month rental there. He bought his tea and coffee wholesale, and then sold it retail. He also dealt in enlarged photographs, and was a commission agent as well. His business required a person of activity. The best part of his business was the tea and coffee. He paid 1s. 2½d. per lb. for the tea, and retailed it at 3s. per lb., so that he made 1s. 9½d. on every pound of tea he sold. He had over 500 customers. His average profit per week was over £10. Some weeks he made about £15, and other weeks £8 10s. or £9. After the accident he had had to give up the house in Roeland-street and move into one room. He had also to sell the furniture in order to exist. Witness then described the accident. He said he was holding on to the back part of the tram with one hand. He had one foot on the steps, but while he was about to lift the other foot the tram started. He had a portmanteau in his hand. The tram was not in motion when he got on. He had been unable to attend to business since the accident. He still suffered, and he had not had a good night's sleep since then. When he attempted to read or walk any distance everything became dark around him. Twice he had tried to do without his crutches, but had found it impossible to do so. Witness had lost the whole of his business. He was a married man, but had no children. He reckoned his loss in actual cash at £200. On August 8 he saw the manager of the Tramway Company, in order to see if some arrangement could not be made without coming to court. The manager then told witness it was his own fault, because he had no right to jump on the tram in motion. Witness felt no stronger now than he did last July. There was nothing he could suggest by which he could earn a living.

Cross-examined : When he was examined by Dr. Fuller he had said he had a heavy portmanteau in his hand at the time of the accident. There were about 10 or 12 lb. of tea in the bag. He dealt wholesale with Lawrence & Co. and others. He also bought tea for cash.

For the defence.

Thomas Prescott, motorman in the employ of the Tramway Company, deposed that on June 20 he was in charge of the car which was running when the accident took place. It was about four o'clock. A lady at the signal post held up her umbrella, and witness stopped the car. He turned round, and looking through the middle of the car, saw that the lady had got on. He then looked round the side, and seeing that all was clear, he started off in the ordinary way. Witness had proceeded three or four yards when he heard a shout. He stopped the car immediately, and looking round saw plaintiff lying in the road.

Cross-examined : Witness had at that time been a motorman for fourteen months. It was not his duty to wait until he got the signal from the guard before he started. The guard was in charge of the tram.

William Milne stated that he was conductor on the tram in question, and at the time the accident happened he was on the top of the car collecting fares. While he was on the top he saw a lady signalling, and the tram stopped. It then started again, and stopped a second time a few yards further on. The tram did not start with any extraordinary jerk.

By the Court: It was the guard's duty to give the signal to start the tram after it had stopped.

Arthur Bessel, a farmer residing on the Flats, stated that on the day of the accident he was standing with Mr. Gird on the opposite side of Sir Lowry-road. He saw the tram coming along. It stopped for a lady, and then, when the tram was in motion, he saw the plaintiff on the steps, with a black bag in his hand. Plaintiff had both feet on the steps. The car was going at a very slow rate: it was hardly moving. Witness could not say whether plaintiff was getting off or on, but the weight of the bag must have slewed him round. Witness picked up the bag, and found it was pretty heavy.

Cross-examined: Witness would say there were about three or four people on the platform at the time.

John Wilson Gird, manager of the branch store of the Van Ryn Wine and Spirit Company in Sir Lowry-road, stated that he was standing with the last witness when the tram passed. He saw it stop, but turned away his head, and did not see anyone get off or on the car. A few seconds later he looked round and saw a man lying on the ground with a black bag alongside him.

Donald McDonald, superintendent of the Tramways Company, stated that the motorman Prescott had been in the service of the company twenty-one months. He was an excellent man, and knew his business thoroughly. The car was a new one, and one of their latest.

After a [illegible]ment.

De Villiers, C.J., said: In this case there is no doubt the plaintiff has sustained very serious damage, but the material question is whether or not the injuries sustained were caused by the negligence of the defendants or their servants. Now as to the facts of the case, I think they are practically uncontradicted. The plaintiff was in the act of mounting the tram car and had one foot on the step, but before he had time to lift the other foot the tram moved off suddenly, and he fell to the ground and was seriously injured. The question now is whether the tram car moved before the defendant had a firm footing on it. In my opinion it is the duty of the company to see that the tram does not move until the passengers mounting have a firm footing. It is said that in this case the guard was busy collecting fares, and that it was, therefore, impossible for him to see that the proper signal was given to the motorman, but of course if the duties of collector of fares interfere with those of conductor, then separate officials should be appointed. It is no answer to say that the conductor was busy collecting fares, for while he was doing so there should have been someone on the platform to do his duties there and see that the car did not move while passengers were getting on. It has been said that there was contributory negligence on the part of the plaintiff because he was carrying a bag at the time. But the carrying of the bag would not have caused the accident if the tram had not moved. Therefore it is impossible to say it is a case of contributory negligence. There was no negligence on the part of the plaintiff in keeping the bag in his hand while mounting. The defence, therefore, of contributory negligence falls to the ground. The next question is that of damages. In cases of this sort, what the Court is anxious to do is to fix an amount which will be a fair compensation for any loss the plaintiff may have sustained, and that accidents of this kind should not be made the occasion of getting extravagant damages. Still it appears that the plaintiff has sustained serious injuries, and the judgment of the Court will therefore be for £250 damages and costs.

Maasdorp, J., and Solomon, J., concurred.

[Plaintiff's Attorneys, Messrs. Walker & Jacobsohn; Defendants' Attorneys, Messrs. Scanlen & Syfret.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hons. Mr. Justice MAASDORP and Mr. Justice SOLOMON.]

PROVISIONAL ROLL.

HERTOG V. G. P. BUDLER. } 1898. Nov. 3rd.

Mr. Currey applied for provisional sentence for £400 on a promissory note, with interest from August 15, 1898.

Granted.

FILMER V. F. W. SMITH.

Mr. Gardiner applied for provisional sentence for £30 on two cheques, with interest.

Granted.

ILLIQUID ROLL.

STEYL V. ESTATE OF MARINCOWITZ.

Mr. Gardiner applied, under Rule 319, for an order authorising the executor in the estate to pass transfer of certain property.

Granted.

IN THE MATTER OF THE PETITION OF ALFRED WILLIAM STEVENS AND ANOTHER.

Mr. Upington moved for leave to the petitioners to sue the Union Steamship Company (Limited), in an action for damages, *in forma pauperis.*

The matter was referred to counsel for certificate.

MACLACHLAN V. BRITISH SOUTH AFRICA COMPANY.

1898.
Nov. 3rd.

This was an application on behalf of the defendants in the action for the appointment of a commission to take the evidence of certain witnesses.

The declaration claimed damages in the sum of £3,000 on account of certain false and fraudulent representations made during December, 1895, by the defendants, or their agents, to the plaintiff. These damages were sustained in connection with the Jameson Raid. The plaintiff was a trooper in Dr. Jameson's force, and he alleged that certain false and fraudulent representations were made to him whereby he was induced to enter into the fighting, and was severely wounded. and sustained damages. The defendants admitted that in December, 1894. the plaintiff was employed to serve for a period of one year in the police force. In December, 1895, the term of service was extended for a further period of one year, and while so employed the plaintiff took part in an armed expedition, and in a conflict with the forces of the South African Republic, he was severely wounded and taken prisoner. He remained in the service of the company until May, 1896, when he was discharged at his own request. The defendants denied the other allegations of the plaintiff,

The affidavit of the defendants' attorney, Mr. Syfret, stated that in order to rebut certain of the allegations, the evidence of Dr. Leander Starr Jameson was absolutely necessary. Dr. Jameson was now in Great Britain, and there was little probability of his visiting South Africa for some time. Also in order to prove the manner in which the plaintiff had been treated by the company it would be necessary to have the evidence of several officials of the company in London. There were other persons now resident in the United Kingdom who were fully acquainted with the circumstances under which the plaintiff took part in the armed expedition to the Transvaal. and it was desirable that the evidence of such of those people as were available should be taken. The defendants, therefore, asked for a commission to take the evidence of Dr. Leander Starr Jameson and such other persons in London.

Mr. Gardiner appeared for the applicant.

Sir Henry Juta, Q.C., appeared for the respondent, and said he had no objection, but asked that the commission be made a joint one.

The Court granted the application. and appointed Mr. Mackarness as commissioner.

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice SOLOMON.]

VAN NIEKERK V. VAN NIEKERK.

1898.
Nov. 3rd.

This was an action for divorce instituted by Isabella Maria van Niekerk against her husband on the ground of his adultery with one Lizzie Alexander. The plaintiff claimed the custody of four minor children, the issue of the marriage. and maintenance.

Mr. Benjamin appeared for the plaintiff.

The defendant appeared in person.

Evidence was given by the plaintiff herself, and also by Daniel Johannes Minaar in support of her case.

For the defence, the defendant gave his own evidence with regard to his property.

The Court granted a decree of divorce and ordered the plaintiff to have the custody of the children, the property to be valued by Mr. De Villiers, and half the value paid by the defendant to the plaintiff, defendant to pay £2 a month each for the maintenance of the children, for the girls until they reach the age of eighteen, and for the boys until they reach the age of sixteen.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné.]

[Before the Hon. Mr. Justice **Maasdorp** and the Hon. Mr. Justice Solomon.]

ROUX v. NEL.

1898.
Nov. 3rd.
" 4th.
" 5th.
" 14th.

Release—Promissory notes—Amendment of liquidation account.

This was an action for amendment of a liquidation account, and an order upon the defendants individually to pay certain sums of money to the credit of the estate of which they were executors.

The declaration was as follows:

1. The plaintiff is Johannes Lodewikus Roux, a farmer, residing at Ladismith: the defendants are Jacobus Johannes Nel, of Drooge Riet, in the division of Prince Albert, and Pieter Jacobus Nel, of Floriskraal, in the division of Prince Albert, who are sued both individually and in their capacity as executors testamentary in the estate of the late Anna Magdalena Nel (born Myburgh), widow of the late Jacobus Johannes Nel.

2. The defendants were appointed executors testamentary under the will of the late Anna Magdalena Nel, their mother, who died on or about the 11th September, 1895, and they took out letters of administration on or about the 16th October, 1895.

3. On or about the 18th December, 1896, the defendants lodged a liquidation and distribution account in the said estate, dated the 15th December, 1896, and thereafter a further account was lodged on the 15th March, 1897.

4. The plaintiff is married in community of property to Maria Margaretha Elizabeth Nel, a daughter of the late Anna Magdalena Nel, and one of the heirs in her estate.

5. During the lifetime of the said Anna Magdalena Nel, the defendants incurred liabilities to her amounting to the sum of £2,105 1s. 5d. in the case of the first defendant, and £795 19s. in the case of the second defendant, in respect of moneys advanced by her by way of loan, For the said amounts the defendants signed promissory notes in favour of the said Anna Magdalena Nel, dated 3rd November, 1893.

6. At the death of the said Anna Magdalena Nel the said amounts had not been repaid, and were still due, but the defendants have not brought up the said amounts in their accounts above referred to as assets in the said estate, nor have they paid the said amounts into the estate, although they have been called upon so to do.

7. In the former of the said accounts certain items more particularly set forth in the list A hereunto annexed have been charged against the said estate which ought not to have been charged. The plaintiff objects to the said charges as being unnecessary and improper, and not chargeable against the heirs, nor are there proper vouchers for the same. The defendants have been called upon to expunge the said items, but they refuse so to do.

8. The plaintiff further objects to the amounts appearing on the credit side of the said accounts as fixed deposits in the African Banking Corporation, and says that the amounts of the said fixed deposits and the dates thereof are incorrectly stated in the said accounts.

The plaintiff claims against the defendants as executors:

(*a*) That they be ordered to amend the said liquidation account, dated December 15, 1896, by expunging therefrom the items in list A, wrongly charged therein, and restoring to the credit side of the said account the amounts due by them respectively, of £2,105 1s. 5d. and £795 19s., with interest from November 3, 1893, so that the said amounts and interest may appear in the said account as assets in the said estate.

(*b*) That the defendants be ordered to render a true and proper account of all amounts received for and on account of the said estate, or expended on behalf thereof, with proper vouchers.

(*c*) Alternative relief.

(*d*) Costs *de bonis propriis*.

And as against the defendants individually:

(*a*) That they be ordered to pay to the credit of the said estate the amounts of £2,105 1s. 5d. and £795 19s. respectively, with interest thereon from the 3rd November, 1893.

(*b*) Alternative relief.

(*c*) Costs of suit.

The defendants pleaded as follows:

1. They admitted the advances to them by their mother of the sums mentioned in the 5th paragraph of the declaration, and that they signed the promissory notes for those sums. But they said that on the 20th December, 1893, she released Jacobus

Johannes Nel, and on the 17th March, 1894, she released Pieter Jacobus Nel from their indebtedness respectively to her.

2. They refused to expunge the items detailed in Annexure A, and said that they were fair and reasonable: and they said specially that the amount of commission to which, as executors, they were by law entitled, and with which they had not in the accounts debited the estate, was greater than the total of the items set forth in Annexure A.

3. They said that the entries referred to in paragraph 8 of the declaration were correct, and that they had duly brought up in the account all the assets found by them in the estate.

The replication was general.

Sir H. Juta, Q.C., and Mr. Jones appeared for the plaintiff.

Mr. McGregor and Mr. Upington appeared for the defendants.

Sir H. Juta said that the plaintiff abandoned the allegations set out in paragraphs 7 and 8, and the only question now was as to the release of the notes.

After argument,

The Court held that the onus of proof was on the defendants.

Jacobus Johannes Nel, one of the defendants, said that his father's estate was closed at a meeting of heirs in November, 1893. His mother took possession of her estate and took over all the debts owing to the father's estate. The heirs signed promissory notes in her favour. Witness owed £2,105 to the estate. He signed a note for that amount. Van Velden, an agent, gave the notes to his mother and told her they were her property and she could do what she liked with them. On the 20th December, witness told his mother that he felt the burden of the debt very heavily and would prefer her taking the ground back again: that was the ground he had bought in his father's estate. She refused to do so but handed him back the note. She said she would either give the other children their notes also or destroy them. Witness wrote the endorsement on the note releasing him and she signed it. He put the stamp on but dated the receipt 20th November, 1893, by mistake for 20th December, 1893. On the 17th or 19th March, his other brothers were at the farm and his mother gave them back their notes.

Cross-examined: De Wit also signed a note but did not get it back but paid interest on it. He did not know if Mrs. Pienaar was present when he got his note back. His mother was about 67 and in her usual health. The signature to the will of April, 1894, was hers. Witness was present at the meeting at Floriskraal in March, 1896, and said there that he had got his note as a present. He did not know if the others got theirs back. He did not include them in the account because he did not find them in the estate. He remembered Stephanus Fourie and Mrs. Pienaar saying that they had not received their notes. He did not go into a bedroom with his brother just after the meeting but got into his cart at once and went home. Bekker did not see him with a bundle of white papers like promissory notes. Daniel Harmse was present when Piet got his note back. Witness's mother told the brothers to tear up their notes, no stamps were put on. Witness had had the stamp put on the document, because he was afraid it was not genuine.

Re-examined: The note for £2,105 was for the balance of a debt incurred by witness for land and cattle. His mother had taken over the various debts of these heirs. When his mother gave him back the note he scratched out, on her instructions, his names and his initials at the side, and she signed the note.

By the Court: The burden of the promissory note was too heavy, and he told his mother he wanted to give back the cattle and the land. Of the £2,105, the sum of about £600 was for the cattle. In addition to that £2,105 he got his share of his mother's estate. The initials were an endorsement to an alteration in the note itself.

Pieter Jacobus Nel, the second defendant, and co-executor in his mother's estate, corroborated his brother as to the four brothers being at his mother's farm about two years before her death. Witness had debts in the estate, and they came to a settlement with regard to them, witness signing the promissory note for £795. It was the balance of the purchase price of some land and movables. The land in question was in his father's estate His mother took over his debt, and he became her debtor. His mother took possession of the notes after they were signed. Afterwards, in March, 1894, witness received back the note from his mother. All four brothers were present on that day, and also Daniel Harmse. His mother told them then that she had already given Jacobus back his note, and as she intended to give them theirs back also, she would do so at once, for she expected there would be trouble and ruin for them after her death. She told them to take the notes and destroy them. At the same time she said she was giving them their notes, and she would also give back the notes of the others, or if she did not do so she would destroy the notes. There was no secrecy about his getting back his note. The signature on Jacobus' note was his mother's signature.

Cross-examined: His mother had spoken to him before March about giving him back the note. It was shortly after the note was made. There was a meeting of the heirs and others at his mother's house after her death, and on that occasion witness mentioned that De Wit had called a few days prior to the death of witness's mother, and paid the interest on his promissory note. Witness said nothing when Bekker said at the meeting that £9,000 was due on notes. Witness did not on that occasion go with his brother to a separate room, neither did Bekker suddenly enter the room and see witness's brother with a bundle of white papers in his hand. If Bekker said so he would not be telling the truth.

By the Court: Witness was in the house when his mother died, and knew he was appointed executor. He did not immediately take possession of all documents. He had only the keys of the box, and did not search for documents. The documents were in his mother's bedroom, but he only took possession of them on the day all the heirs came together. Witness gave all the documents to Mr. Willmot. Witness's mother had told him shortly after he gave her the promissory note that she intended to give it back to him. At the time Jacobus received his note back witness knew that he also was to get his note back. It would be a free gift from his mother.

Johannes Paulus Nel, a brother of the two previous witnesses, corroborated as to the brothers giving promissory notes in November, 1893, and receiving them back in March, 1894. Before that he had never heard of Jacobus getting his note back.

By the Court: Witness's mother was an intelligent and good business woman.

Jan Abraham Nel, another brother of the defendants, also corroborated as to their giving promissory notes in November, 1893, and receiving them back in March, 1894.

Cross-examined: After De Wit had been at witness's mother's house and paid the interest on his promissory note, witness told him that he had got his promissory note back.

Daniel Petrus Jacobus Harmse deposed that he was present at the house one day when the four brothers Nel were there. That was in March, 1894. Mrs. Nel that morning gave the sons back their promissory notes. She also stated that she would burn those promissory notes she did not give back. He had seen Mrs. Nel frequently after that, and the promissory notes had formed a subject of conversation. She again repeated that she would burn those notes she had not given back, so that after her death there would be no trouble. Jacobus had received his note back in December, 1893. Witness was present at Nel's house the day he came from his mother's with the promissory note. He showed it to witness and to his wife.

Cross-examined: He spoke everywhere about the release but could not mention any particular person to whom he mentioned it.

Israel Zacks, a storekeeper at Laingsburg, said Mrs. Nel treated him like his own mother and gave him a room in which he stored his goods—he lived at the farm for some time Mrs. Nel had told him about the release of the notes.

Cross-examined: She told him every now and then about the notes.

Hendrik Groenewald said he lived at Kloppefontein and went on "togt": he often went to Floriskraal and about June, 1894, he asked Mrs. Nel for a loan, whereupon she told him that she got nothing out of the notes as she had made them over as a gift.

Cross-examined: Was married to a daughter of Johannes Nel. Mrs. Nel said she got no interest on any of the notes and that was why she had no money.

Jan Abraham Hanlun said he was a corn-farmer and lived at Floriskraal. About July or August, 1894, Mrs. Nel told him she had given the notes to her sons and intended to give her sons-in-law their notes; she said she wanted to make them a gift of their indebtedness, because after her death it would lead to legal proceedings.

Cross-examined: Witness was a cousin to Piet Nel and held ground from him on half-shares. Mrs Nel said Le Roux and Van As were the peeple who would institute legal proceedings.

Carl Jacobus Hanlun gave similar evidence. He said he knew Mrs. Nel's signature and testified that the signature on the note of J. J. Nel was hers. He had seen her signing letters.

This closed the defendants' case.

For the plaintiffs,

T. C. W. Johnson said he had acted as Mr. Nel's legal adviser for many years and did not consider the signature on J. J. Nel's note to be hers. At the meeting on the 3rd November, 1893, the list (put in) of debts and inheritances in the estate of Mr. Nel was drawn up. The promissory notes were then made by the children, and then a will was drawn up and signed by Mrs. Nel, that placed the heirs who had been left out of her husband's estate on the same footing as the rest. Witness prepared the notes, they were on white paper and in the handwriting of Van Velden, his partner. On the 24th May, 1895, P. J. Nel came to him and said Mrs. Nel complained that people did not pay up their interest. Witness said, "How is it that none of you heirs pay on the promissory notes due to your mother?" P. J. Nel said, "None of them have paid as yet. Witness was agent for the Ladismith business until some time in 1896, and never heard from any of the Nels that these notes had been released.

Cross-examined: The signatures to the two wills correspond, but not with that on the note. Amongst people of that class there is generally more uniformity of signature. Mrs. Nel was fond of her sons, and very generously disposed towards the children. Jacobus was her favourite. She had been annoyed with Roux because he had brought an action against the estate and upset the will. Van As was partly against her. She had forgiven them all on the 3rd November. She said then that it was her wish that they should all be treated alike, the children to pay the interest until her death and then the debts to be paid into her estate.

H. W. Bekker said he was present at the meeting in the estate of March, 1896, and spoke to J. J. Nel about the £9,000 of notes not appearing in the liquidation account. J. J. Nel then said that the notes had been given back by Mrs. Nel. Roux then asked the other heirs if they had got their notes back. Fourie and Mrs. Pienaar both said "No." Piet Nel made no answer. Witness then asked J. J. Nel to explain, and he repeated what was said. The meeting then broke up, and witness went to his cart, but went back again to the house as he had left a bag in a bedroom. In the bedroom he found J. J. Nel and P. J. Nel; the former had in his hand a bundle of white papers with bold handwriting upon them; he turned round and dropped his hand when witness entered.

Cross-examined: Was the local agent, and had been acting for Roux for some time. Mrs. Pienaar, Fourie, Roux and Van As were dissatisfied at the meeting and from time to time the proceedings were started.

C. G. Smuts said he had been clerk in the Deeds Registry Office for the last twenty-five years. His duty was to enter bonds before registration: he frequently had bonds in his hands on which the names were similar to names for which he already had a folio. In order to judge whether the names were those of the same persons or of others of the family, &c., he could only go by comparison of signatures. From this experience of twenty-five years, he had not the least hesitation in saying that if the signature to the will put in was genuine the signature to the note was an imitation. The A's, the M's, and the N's were different. If two bonds came before him bearing those signatures he would not place them in the same folio.

Cross-examined: He had not studied caligraphy outside his office. He had had experience of the same person forming his letters differently at different times, *e.g.*, small letters instead of large, loops sometimes and not at others. Bonds were sometimes thrown out on witness's sole authority as a judge of signatures.

Christoffel F. de Wit, said he was one of the heirs of Mrs. Nel. He had signed a promissory note for £320 and had paid interest upon it twice; on the second occasion he offered it to Mrs. Nel a few days before her death. She told him to pay it to P. J. Nel, and he did so.

Cross-examined: Witness signed a document closing the estate: it was brought to him by Wilmot.

By Solomon, J.: He knew when he signed the document that the £9,000 had not been called up. He was satisfied with it if Mrs. Nel had given up the notes.

Alida Pienaar said she was a daughter of Mrs. Nel, and lived with her and nursed her up to her death. She had made one of the notes herself. Her mother had never spoken to her about the notes. P. J. Nel, after her mother's death, told her his note had been released. Her mother had told her she was not satisfied with the children not paying interest. After the sale in the estate, P. J. Nel had told her that the notes had been destroyed by Jacobus and he did not know if everything would come right.

Cross-examined: Witness was sometimes away from home: in the month of March of one year she was at the Strand, but could not remember which year. She had had a domestic difference with her mother but did not think her mother had any feeling against her on that account. Witness told Roux what P. J. Nel had said about the notes being destroyed.

By Maasdorp, J.: Her mother was on rather unfriendly terms with Roux and Van As, but not very much so. She had never paid interest as her mother had never asked her for it.

William James McLeod said he was present at a meeting on March 12, 1896, at Florieskraal. A question was put to Mr. Jacobus Nel as to receiving some promissory notes, and also to other heirs in the estate. Mr. Piet Nel did not reply, but Jacobus said he had received his notes back. Jan Nel said his mother had given his back and he had torn it up.

Stephanus Fourie, who married cne of the daughters of the late Mrs. Nel, said that he used to visit his mother-in-law. He signed a promissory note for £600 or £700. He remembered the death of Mrs. Nel. Up to the date of death he had heard nothing as to the promissory notes being released. Mrs. Nel never said anything to him as to what she was going to do with the promicsory notes. Witness did not get his promissory note back.

Cross-examined: Mr. Roux told witness he had heard that the old lady had given as a gift the four promissory notes. Witness was quite satisfied with the liquidation account.

By the Court: He thought that at Mrs. Nel's death the amounts due would be paid into the estate and divided amongst all.

Cornelius van As, who married one of the daughters of the late Mrs. Nel, said he spoke to her in July, 1895, about money affairs. He asked her to lend him £100 for the woodwork of his house. She said she would be glad to do so, but she had no money. Witness asked her how about the interest she had received from her children. She said she had never received a farthing in interest.

Jacobus van der Bank said he had worked on a dam for Piet Nel. After he had finished, Piet told witness he could give him no more work. He was only a young beginner, and he owed the estate £6 0 or £700.

Cross-examined: Witness volunteered to give evidence in this case. He had only been in Cape Town once before, and that was as a witness in another case.

Johannes Lodevicus Roux, the plaintiff, said he was in the habit of visiting Mrs. Nel before her death. He had asked her for money on one occasion, as he wished to buy a Government water-bore. This was in 1894. She said she had no money; she got no interest from her children. Witness frequently saw Mrs. Nel after that. She never said anything to witness as to the promissory notes having been given back, or that she had released her children from their debts. Witness had trouble with Jacobus Nel about the estate, and about the illegal way in which he had sold some land for £13,000.

Cross-examined: Mrs. Pienaar told him on the day of the sale that Jacobus had destroyed the promissory notes.

This closed the plaintiff's case.

P. J. Nel, recalled by the Court, said he had never told Mrs. Pienaar that Jacobus had torn up the notes.

Sir H. Juta: The very clearest proof possible is required of a release such as is set up by the defendants. *Van der Poel's Executors* v. *Molan* (Sheil 8, p. 83). The release is entirely for their benefit. *Taylor's Law of Evidence* (section 965). The further argument was upon the facts and credibility of the witnesses.

Mr. McGregor: The evidence for the defendants can only be met by allegation of fraud, forgery, and conspiracy. The plaintiff's case rests on suspicion merely and the evidence does not support the other allegations.

Sir H. Juta: The defendants were in a fiduciary capacity. They never spoke of the release during testatrix' life-time: their case is set up after her death; therefore the onus is wholly on them. Smuts' evidence as to signature is very strong.

[Solomon, J.: But it cuts both ways; if a forgery the letters would have been formed more similarly.]

Maasdorp, J., said: The plaintiff in this case sues the two defendants in their capacity of executors testamentary of their mother, Mrs. Nel, and also in their private capacity, for the amendment of the liquidation account, which was filed by them in their capacity as executors testamentary. It is alleged that the liquidation account is incorrect, in that it omits two items which should have been entered to the credit side of that account. It is alleged that the two defendants were indebted to the estate in the sums of £2,105 1s. 5d. and £795 respectively; that they were indebted in these two amounts to the estate at the time they made this liquidation: and that they should have brought up these two amounts in that account to the credit of the estate, but failed to do so. It is therefore prayed that they be ordered to amend the account by including these two items. The defendants admit that they were at one time indebted to their mother; that they were indebted to her, as alleged in the declaration, on two promissory notes made by them in her favour; but they say that they were released from these debts by their mother prior to her death, and that consequently there was no debt due by them to the estate upon her death. As to the way in which these debts arose, it appears that on November 23, 1893, when the estate of the father was liquidated and settled there were certain debts due by a number of the heirs, who were the sons and sons-in-law of Mrs. Nel, to the estate of the father, and in the settlement made by them at that time this indebtedness was taken over by Mrs. Nel into her estate. Thereupon, on November 23, 1893, promissory notes were signed by the sons and the sons-in-law and one daughter. Amongst those promissory notes were two signed by the two defendants. At the time these notes were signed we have evidence that it was brought to the notice of the mother that the promissory notes then handed to her by the agent became her private property, and that she could deal with them as she pleased. The defendants admit all this, but say that their mother released them from these notes on December 20, 1893, and March 13, 1894. Their defence is therefore that they were released from these debts by their mother before her death. Now it was held that the onus of proof of this release lay upon the defendants, and not only is that so, but considering the position of trust which they held in this estate, they would be put to the very strictest proof, and the clearest evidence would be required on their part to prove that this release actually took place. The onus having been thrown upon the defendant Jacobus, he proceeds to discharge it in the following way: he states that on December 20, 1893, when he was at his mother's house, he expressed to her his distress at being weighed down with so much debt, and when he wished he could be released, his mother said to him he need not distress himself about it, because she intended to release all those who had signed promissory notes from their indebtedness, and give them back their promissory notes or destroy them. Thereupon his mother fetched his promissory note out of the bedroom, and a release was endorsed upon it, to which she affixed her signature. As to what took place on that occasion we have only the evidence of Jacobus Nel himself. Now, the document is put in with a signature which is alleged to be the signature of Mrs. Nel. It is contended on the part of the defence that it has been proved that this is a genuine signature, and on the part of the plaintiff certain circumstances have been brought forward in order to satisfy the Court that this is a forgery. Now, looking at the signature itself and comparing it with the three other signatures which appear in the wills book, which has been produced, and which are undoubtedly genuine signatures, the Court has some means of arriving at a conclusion on this point. What strikes one on looking at the signature is that it consists of what one might call a very clumsy, awkward, and scrawling copy of a mental picture of a name. There is no fluent mechanical writing, but it looks as if one were drawing a picture of a certain number of letters. The result of that is that every signature made by a person of that kind may be taken in the first instance as an imitation of any other signature made by her. If the wills book referred to be taken it would appear that there are very serious differences between the different signatures, but still a sufficient resemblance exists to satisfy one that these signatures were made by the same person. Still, it might happen that anyone not well acquainted with the signatures of these people may come to the conclusion that the one was only a careful copy of the other. There is certainly a difference between the genuine signatures, but it must be admitted that the difference between the genuine signatures and the signature on the promissory note produced is somewhat greater. But if at the same time the signatures are compared there is a general resemblance. In the same way as the others may be regarded as imitations of one another, so it may be said that there is here, to all appearances, a careful imitation. That being so, it is impossible, on the simple point of the signature alone, to come to a conclusion that this is or is not the signature of Mrs. Nel. I quite see that some further evidence may be required to satisfy the Court that this signature is that of Mrs. Nel. That further evidence is given by the direct statement of Jacobus Nel himself. Here, again, we have the whole evidence of what took place on the first occasion, but it may fairly be contended that before accepting that as sufficient it must be so strongly corroborated by other witnesses that the Court cannot help but come to the conclusion that what he says is correct and true, that that was the signature of his mother made in his presence. As to the rest of the evidence, we come next to the meeting which took place on March 13. At that meeting at Mrs. Nel's farm there were present the four brothers Nel and a certain Harmse, These witnesses have all been called, and have positively stated that in their presence Mrs. Nel handed back to the three sons their promissory notes, and informed them at the same time that she intended to give back the notes to the other heirs also. We have this positive statement made by all these persons, one of whom appears to be a wholly disinterested witness. These statements having been made, the only way in which their correctness and truth can be tested is by ascertaining whether there is any direct denial of what they say, or whether there is any such inherent improbability in what they said, so that they could not be believed, or whether certain other facts have been proved so inconsistent with what they said that the Court cannot accept their statements. As to the probability or improbability of what they said, we must look at the position of the parties in this case. We have had it from Mr. Johnson, who is a disinterested witness, that Jacobus Nel was always regarded by his mother as her favourite, and that she had great influence with him. With regard to Roux, Pienaar, and Van As, Mr. Johnson also told us that for some reason or other Mrs. Nel was very much displeased with these three persons. Now if Jacobus Nel was such a favourite with his mother, is there any improbability in her doing as she did do with regard to him, and handing back this promissory note to him ? Is there any inherent improbability considering the circumstances under which she handed back the notes to the other three sons ? It is alleged that she did so in order to avoid trouble in the future ; that she expected that on her death certain parties would cause expense to her children. Now is there any improbability in her acting as she has done and putting it out of the power of these people to make trouble by releasing the children and so preventing any steps being taken against them on her death. There was said to be one suggestion of great improbability, and that was, how was it that, if this were done, it never came to the knowledge of other interested parties ? The explanation of that may be that the mother herself might have expected unpleasantness if she had mentioned the matter to Roux, considering that Roux had already caused her so much trouble, and might cause her more if he discovered that she had been releasing those children from their debts to the estate. Now that is with reference to the probability or otherwise of the statements made by the sons as to what took place at that meeting. The next question is whether any facts have been proved which are wholly inconsistent with the statement made by those five persons as to that meeting. It has been pointed out that, notwithstanding that, it has been stated that they were released from their debts by their mother, and that she intended to release the other heirs also. De Wit had on several occasions paid the interest, and that on one occasion, in the presence of Peter, shortly before her death, interest was again paid. Now there was some doubt cast upon that circumstance by the document handed in to prove that payment. It would appear from that that it might have reference to some other debt, and not to the promissory note. However that may be, there is some doubt as to the circumstances under which that payment was made, and I do not think that this then is an absolute contradiction of the statements made by the defendants, because I can quite understand that Mrs Nel, although she intended before her death to release her heirs of their liability, would still have no objection if any of the heirs had come forward during her lifetime to pay to her any interest on this money. That single instance of this one heir paying her the interest upon his promissory note is not of sufficient weight to contradict all the other evidence of the defendants upon this point. We have also the evidence of Roux, who says that he was requested by Mrs. Nel to go to Mr. Johnson and ask how it was that he had received none of the interest. That evidence was brought forward to show that she expected the interest to be paid, but as a matter of fact Mr. Johnson told the Court that the interest he was receiving on behalf of Mrs. Nel had nothing to do with the interest due upon promissory notes due by the sons, so that if Roux were so sent we may conclude that the interest in question had nothing to do with the indebtedness of the sons, and is no proof that the mother still regarded the sons as liable upon the promissory notes. Mr. Johnson told the Court that on one occasion on Peter Nel coming to him he had stated, in reply to an inquiry made by him, that the sons had not yet paid interest. Well, the whole of that statement as throwing any light upon the notes is involved in the use of the word "yet." If Peter Nel had simply told Mr. Johnson that the sons had not paid interest, that would have been in accordance with the fact that they were not liable to pay any interest. Mr. Johnson had laid very great stress upon that word "yet," so that he took it that although they had not yet paid interest, yet they expected at some other time to be liable. But I cannot think that that conversation having taken place so long ago can have any great weight with the Court. It was said that the mother had at times complained of not getting her interest from her sons. Now, I am not satisfied that the witnesses who gave evidence of that fact are correct, because we find that she had never claimed interest from any one of the heirs who had signed the promissory notes. Fourie had said she never asked him for interest because she never required money. Mrs. Pienaar also said that she never asked her for interest. If the indebtedness had continued it is quite conceivable that the mother would at one time or another have asked one or other of these heirs for the interest that was due to her. She never did so, and the inference that can be drawn from that is corroborative of the evidence of the four sons who say that they were released, and that their mother intended to release the other heirs. I am led, therefore, to the conclusion that it is impossible to set aside the direct statements made by these heirs upon the evidence which is said to be in conflict with it, especially when we remember it is supported by the evidence of Harmse, Zachs, Hanlun, and Groenewald. This also bears upon the argument that the secrecy which was maintained all through this case—that the circumstance was mentioned by the heirs—proves that the release was never granted. It has been said that great secrecy had been maintained, but if we are to believe Zachs, Harmse, Hanlun, and Groenewald, that secrecy was never maintained by Mrs. Nel herself. She told Zachs on more than one occasion that she received no interest from her sons, that she had released them, and that she had granted the same release to all the heirs. She mentioned the same circumstance very freely to the two Hanluns on the occasion when they came there to trade with her, and she also told Groenewald. So here in the presence of disinterested witnesses, three of whom came there casually, she freely spoke of her having released her sons from their debts. Here then we have positive evidence from the mouth of Mrs. Nel herself that she had granted an absolute release. As to the releases granted by the mother, on March 13, 1894, we have evidence which I think may throw some further light, and which bears strongly upon the interview between Jacobus Nel and his mother on December 20, 1893, for if there was corroborative evidence of this fact that she intended to release the sons from their debt, and if she did so, that would be corroborative evidence of the statement, that made by Jacobus Nel that she released him from, his indebtedness on the promissory note on December 20. If we accept this statement as so corroborated then no further difficulty exists as to the signature on the promissory note. As to that signature it has been argued that even although there has been some suspicion attached to it we could ascertain whether the release was not granted in spite of that suspicion, but I must say that if the Court had once discovered that there was any fraud connected with that signature, no case raised by the evidence would have had any weight with the Court. Under these circumstances, having in view the positive evidence of the witnesses I have mentioned, corroborated by others to whom Mrs. Nel admitted that she had released her sons from their indebtedness, and seeing that there were no circumstances in conflict with that statement, no inherent improbability, no direct contradictory statement, the Court cannot but come to the conclusion that the evidence of these witnesses is true. That being so, I come to the conclusion that it has been satisfactorily and clearly proved that the mother released the two defendants, as well as the rest of the heirs, from their indebtedness on the promissory notes, and that these amounts should not now be included in the liquidation account.

Solomon, J., concurred, giving his reasons for doing so, which were in the main the same as those of Mr. Justice Maasdorp. He, however, pointed out as supporting the evidence of the defendants that some of the heirs who stated they had been released from their indebtedness on the promissory notes would actually have received more if it had been shown that none of the heirs were released, and the defendants would have had to pay the amounts of the promissory notes into the estate.

After hearing further argument, the Court decided that the plaintiff in the action having failed to prove his case would have to pay the costs.

[Plaintiff's Attorney, D. Tennant, jun.: Defendants' Attorneys, Messrs. Sauer & Standen.]

MCGREGOR V. DIVISIONAL COUNCIL OF CLANWILLIAM.

1898.
Nov. 7th.
„ 8th.
„ 9th.
„ 11th.
„ 16th.

Water-right—Obstruction of stream—Injunction—Damages — Divisional Council.

By the authority of a Divisional Council, one of its members constructed a wall of stone and bushes in the channel of the Orange River immediately above the outflow of a smaller stream which was a public and perennial watercourse. The object of the construction was to divert back to the main channel of the river a portion of the water, all of which was then passing through the outlet, but part of which used to flow down the main channel until a few years previously, when its course had been changed by natural causes. The result of the construction was the formation of a sand bank, which in a few years blocked up the outlet, and entirely cut off the water supply of the plaintiff, a riparian proprietor on the smaller stream.

Held, *that the Divisional Council were responsible for the damage necessarily suffered by the plaintiff in consequence of the obstruction, but not for such increased damages as were occasioned by his delay in taking action to have it removed.*

Held, further, *that an injunction should be granted ordering the Council to remove the obstruction and restore to its former course so much of the water as had formerly flowed down to the plaintiff.*

This was an action for £500 damages occasioned by the diversion of a stream, and an order compelling the defendants to remove certain obstructions in the stream.

The plaintiff was the owner of the farm Modderfontein, in the division of Clanwilliam, and he was a shopkeeper as well. The declaration set forth that the Olifant's River, which is a public perennial stream, flowed not far from the plaintiff's farm, and from Olifant's River there was a channel, which was a public perennial stream, from which water had always flowed, and had flowed for thirty years, on to and across plaintiff's farm: that it flowed, and always had flowed, in this natural channel; that the plaintiff had been entitled to use the water by virtue of his ownership of the land, and had so used the water for domestic purposes, for watering stock, and for agricultural purposes. He and his predecessor had so used this water for more than thirty years. They had used it in that way until the year 1891, when the Divisional Council placed certain obstructions in the Olifant's River bed, which interfered with the flow of water in the channel coming down to plaintiff's farm, diverting the water, and in consequence of these obstructions the water gradually began to cease to flow, until at last it absolutely ceased, there being no water there now. The prayer was that the Divisional Council be ordered to remove these obstructions, and allow the water to flow in its own natural course, and further, for £500 damages.

The defendants' plea was that the Olifant's River was a public perennial stream, from which ran certain spruits, which are only filled with water during times of flood, and that one of those spruits ran out of the Olifant's River on to and over the plaintiff's farm. (This was the stream claimed by plaintiff to be perennial.)

That in 1890 there was a slight change in the bed of the Olifant's River, and that thereupon a certain bridge, which had been erected by the Colonial Government. became endangered. Then a Mr. Van Zyl, with the assistance of the Colonial Government, and the owner of a farm adjoining plaintiff's, put certain bushes and other things in the new course of the stream, the effect of which was to divert most of the water back into the old channel. These obstructions had since been swept away, but the river had continued to retain for the most part its old channel. The obstructions were placed there by Mr. Van Zyl, who employed labourers in the employ of the Council, but did so without the authority of the Council. The spot where these obstructions were placed was pointed out to Mr. Van Zyl by Mr. Bromley, an engineer who had been specially sent by Government to inquire into the safety of the said bridge. All these things were done without the authority of, and had never been ratified by the Divisional Council. The plaintiff at the time knew what Mr. Van Zyl was doing, and made no objection.

Defendants further said that these obstructions placed in the river did not prevent the water flowing down the channel in time of flood.

The issues were, first, whether the stream which flows out of the Olifant's River, in which it is common cause obstructions were placed by someone, was a perennial stream constantly flowing with water, or whether it was as defendants say simply a spruit in which water only runs in flood time, and secondly, whether these obstructions were placed there by Mr. Van Zyl and the Colonial Government, or by the defendants or on their authority.

Sir H. Juta, Q.C. (with whom was Mr. Gardiner), appeared for the plaintiff.

Mr. Graham, Q.C. (with whom was Mr. McGregor), for the defendants.

Mr. Graham applied for leave to make certain amendments in paragraph 5 of the plea, which would make it read that the effect of the obstructions placed in the river by Mr. Van Zyl was to temporarily divert at the time the water of the main stream back into the old channel, and that the said diversion afterwards, owing to natural causes, became greater and more lasting.

Sir Henry Juta objected to the amendments, on the ground that they introduced a new feature into the case.

Maasdorp, J., said the amendments certainly to some extent introduced a new feature, but the question was were they really necessary. If they were, and the defendants said they were, then they must be allowed; but if the plaintiff was in any way prejudiced by this new matter. then he would be given time to meet the amendments.

The amendments were accordingly allowed.

The facts as stated in evidence appear sufficiently from the judgment.

Postea (November 16th).

Judgment was delivered.

The Hon. Mr. Justice Maasdorp said: The plaintiff, a farmer, and owner of the farm Modderfontein, in the division of Clanwilliam, sues the defendants, the Divisional Council of that division, for £500 damages, alleged to have been sustained by him in consequence of the wrongful acts of the defendants in diverting from its natural course a perennial stream running from the Oliphant's River across his farm. He also prays for an order compelling them to remove the obstructions in the stream caused by their wrongful acts, and to restore the free and accustomed flow of the water into the said perennial stream, as it flowed before the obstructions were placed in it. It is stated in the declaration that above the plaintiff's farm a perennial public stream flowed out of a perennial public river called the Oliphant's River, and after passing in a natural channel over other land, it flowed on to and across the plaintiff's farm. As riparian owner on the banks of this stream, he claims the right to a reasonable use of the water for domestic purposes, for watering stock, for agriculture, and other purposes. It is alleged that at the point where the stream flows out of the Oliphant's River the defendants wrongfully placed obstructions in the year 1891, which impeded the flow of the water, gradually diminished the quantity of water flowing in the channel, until ultimately they entirely prevented the water reaching the plaintiff's farm during the season of the year when he most requires its use, meaning during the summer months. He states that he has in consequence sustained damages in the sum of £500. The defendants in their plea deny that the stream in question is a perennial stream, and say that it is an offshoot or spruit diverging from the Oliphant's River on the farm Langfontein above the plaintiff's property, and again joining the river after passing over his farm. The plea states that this watercourse or channel contains water only in times of flood. The defendants then go on to say that in the year 1890 the Oliphant's River changed its course over the farm Langfontein, and as a result endangered a bridge erected across the river on that farm by the Colonial Government. That, in March, 1891, one D. J. van Zyl, a member of the defendant Council, with the consent of the Colonial Government and of the owner of the farm Langfontein, placed obstacles in the new course of the said stream, the effect of which was temporarily to divert at the time certain water of the main stream of the Oliphant's River back to the old channel, and the said diversion thereafter, owing to natural causes, became greater and more lasting. That the obstructions were shortly after their erection swept away, but the river has continued to retain for the most part its old channel. These obstructions, the defendants say, were effected by D. J. van Zyl, a member of the Divisional Council, and Jan van Zyl, owner of the farm Langfontein, with the assistance of labourers in the employ of the Council, acting under the advice of Mr. Bromley, a Government road engineer, who was engaged in taking steps to safeguard the bridge mentioned above. And all this was done without the authority of the Council, who are not responsible for the work. The defendants further say that the effect of the obstructions was not to prevent water flowing into the said "spruit." The damage alleged to have been suffered by the plaintiff is denied. The pleadings raise the following questions: Is the stream in question a perennial stream? Did the defendants place an obstruction in the Oliphant's River? Was the effect of that obstruction to prevent the outflow of water from the Oliphant's River into the channel across the plaintiff's farm? If the diversion of the water was caused by the defendants, was it a wrongful and unlawful act? And has the plaintiff suffered any damage, and if so, what damage? Upon the first point a number of witnesses were called by the plaintiff, who are in no way interested in this suit, who lived for a considerable time upon and were owners of the plaintiff's farm Modderfontein or adjoining properties. They state most positively that the stream in dispute used to run constantly summer and winter since they became acquainted with the farm Modderfontein, extending over a period of upwards of thirty years. Their evidence is corroborated by that of Scheepers, a road overseer in the service of defendants, who was constantly on the plaintiff's farm when employed on the road, and before that when he crossed the stream repeatedly as post-cart driver. The plaintiff himself, who has known the place since 1867, gave evidence to the same effect. Among the witnesses called for the defence were three Van der Merwes and Abraham van Zyl, who are joint owners of the farm Langfontein. I may say they cannot be regarded as disinterested witnesses, as it appears that it is to their interest to have the water confined to the main channel of the Oliphant's River, and they themselves made unsuccessful attempts to divert all the water into that channel. And, moreover, their evidence as to the character of the stream across Modderfontein is not altogether consistent. Willem van der Merwe said, "The Modderfontein stream was dry every summer, and sometimes for four or five months together." Johannes van der Merwe said, "In good seasons water used to flow in the stream in summer. In bad seasons it sometimes stopped. I saw it dry more than once in summer." Abraham van der Merwe stated, "No water flowed in the stream in the height of summer. It was dry every summer." Abraham van Zyl said, "On the Modderfontein side the flow stopped in dry summers. It did not stop every year. I have seen it flow all the year." As to the evidence of Dirk van Zyl and Jan van Ryn, who only saw the stream as occasional travellers, I am not prepared to take their evidence upon this point as of equal value with that of the plaintiff's witnesses, who lived upon the spot for a considerabled time. Upon the evidence I am satisfied that the stream in dispute is a perennial public stream. The next question is whether the defendants placed or caused to be placed the obstruction in the river which prevented the flow of this stream into the plaintiff's farm. Upon this point it is necessary to ascertain what precisely the obstruction is which now blocks the outlet of the stream from the Oliphant's River. There is a sandbank across the mouth of the outlet. It is not contended that the defendants actually deposited the sandbank there. But it is said they erected in the bed of the Oliphant's River immediately above the outlet a wall of stone and bushes, the direct result of which was the formation of the sand-bank. The defendants deny that this wall was erected by them, and add that however that may be the sand-bank was not caused by this wall, but was the result of natural causes. Upon this part of the case we have the evidence of Dirk van Zyl, a member of the Council, and a witness for the defence, who says that at the request of the Council he communicated with the Government about the work. He took Mr. Bromley's advice on the subject, and informed the Council of it. At a meeting of the Council he was requested to see that the damage to the bridge was rectified, to examine the work, see what was to be done, and do what was necessary. After the obstruction was put up, and the work completed, he reported to the Council, and they were satisfied, and paid for the work. The evidence of Scheepers, road overseer of the Council, is to the effect that Fryer, secretary to the Council, ordered him to take his instructions from Van Zyl in obtaining material for the required wall, and constructing it in the river. Scheepers, in pursuance of this order, and under direction of Van Zyl, built the wall. On the other side, Lubbe, a member of the Council, says he does not remember the work being done by the Council, that such a work would be mentioned at a meeting of the Council, and nothing appears in the minutes. Mr. Edye, the Civil Commissioner at the time and chairman of the Council, stated he never heard of the diversion of the river, and that it would not have been discussed without appearing on the minutes. He was himself very particular about the minutes, but through illness was absent from the Council meetings during the three months immediately following the time when the wall was placed in the river, and it was at one of these meetings that Van Zyl reported and got the approval of the Council. We find that on the 17th March, 1897, the secretary writes to the Commissioner of Crown Lands a letter embodying as a correct statement of the matter what would substantially amount to a statement of the case as placed before the Court by Van Zyl. I can come to no other conclusion upon this evidence than that the defendant Council, acting within the powers granted them under section 91 of Act 40 of 1889, delegated to Van Zyl the inquiry in this matter, with power to act, and that Van Zyl, acting in pursuance of this authority, built the wall in question, which received the approval of the Council. It is now necessary to ascertain whether the sand-bank which was formed in the outlet to the stream was the direct result of this wall being erected in the river. This wall began from the left bank of the Oliphant's River, a short distance above where the outlet was, and ran transversely across the opening towards the middle of the river, and it consisted of bushes, on the top of which stones were placed. When finished the water flowed over it in places, and also through the openings between the stones and bushes. The object in constructing it was to divert back to the main channel a portion of the water, all of which was then passing through the outlet, but part of which used to flow down the main channel until the year 1890, when a change took place through natural causes. The wall had instantly the desired effect, and part of the water, say half, more or less, ran down the Oliphant's River. The wall acted as a breakwater, and some distance from it, against the left bank a sand-bank was formed, which gradually, in course of time, extended across the whole outlet. The defendants' witnesses say that as the wall was washed away shortly after it was built it could not have caused this accumulation of sand. Seeing that the stones and some bushes are still to be found in the line in which they were placed, I am not satisfied that it was demolished so soon, but think it continued sufficiently long to have had a material effect upon the current of the stream. That effect, Scheepers says, was to break the force of the current on the left bank below the wall, and to allow of the deposit in the sluggish water created there of the sand which would otherwise have been carried down. He also says the fall of the water over the wall would stir up the sand immediately below it, and allow it to sink in the quieter water further on. This seems to be an extremely intelligent explanation of a person acquainted with the locality. Bromley, who is a practical engineer, says he has no doubt that the wall caused the diversion as it exists at present. Which can only mean that the sand-bank which is the obstruction in the outlet and causes the diversion must have been the result of the existence of the wall, although he adds that it is possible that sand might have accumulated even if the wall had not been built. Watermeyer thought the embankment might have caused the silting of the sand, and so obstructed the water. On the other side we have the opinions of a number of witnesses that the sand-bank was caused by natural agencies, and they base their opinion upon their knowledge that the Oliphant's River is very changeable, and brings down quantities of sand. But it appears that for more than thirty or forty years no material change has taken place in the "spruits" leading out of the Oliphant's River on the farm Langfontein, and that in 1890, when the Oliphant's River was affected by the flood water, the tendency of the water was rather through the outlet than down the main channel. On the whole I am of opinion that the formation of the sand-bank across the outlet was the direct result of the act of the defendants in building the wall. I am of opinion that the wall caused the deposit of sand in the outlet, which materially affected the quantity of water which formerly used to flow in the stream, and that the entire blocking of the stream by continued silting of sand was merely a matter of time. The defendants are therefore liable for the obstruction of the stream. Upon this point I may refer to a passage in *Angell on Watercourses.* After stating in section 465C that a railroad corporation building a bridge across a river so as to flood the land of the plaintiff is liable in an action of tort, unless they show that they have taken reasonable precautions to prevent unnecessary damage to the land, he goes on in section 465F to say where a railroad company have rightfully and properly turned a stream of water by virtue of their charter they are not obliged thereafter to watch the action of the water, and so protect the banks and take other timely measures to prevent the encroachment of it upon neighbouring lands. It is the duty of the owner of such lands, after the stream has been properly turned, to watch the future action of the water on their own lands, and to cast in whatever may be necessary to protect the banks, and the company are not required to protect them from the effect of the water at all times. All that would be required of the company is to use due care in turning the river, and securing the banks in a reasonable manner. But it must be remembered that in this case that the defendant Council had no statutory duty or right to go upon the farm Langfontein, and then, at a considerable distance from the bridge under their care, to interfere with the flow of the water in the streams. The only right they had was such as they derived from the licence or permission of Van Zyl, the owner of Langfontein, and they could do no more than Van Zyl himself would have had a right to do. The fact that they did what they considered best in the public interest will not protect them where they went outside the powers conferred upon them by the Statute. I am also satisfied that they took no precautions to protect the outlet of the stream in question from the accumulation of sand, which might have been anticipated as the natural consequence of the erection of the wall. They simply put up the wall-without regard to the results that might follow. But then it is contended that the plaintiff consented to and acquiesced in the construction of the wall. I can find no evidence to that effect. All he seems to have done was to express the opinion that the water flowing under the bridge, which was in danger, should be diverted to prevent further mischief. It is argued that when he discovered that his water rights were interfered with he should have taken steps to prevent it, and that by lying by and allowing the obstruction to grow until the supply of water was entirely cut off, and even for some time after that, he has lost his right to redress. The effect of such an argument would be that within the period of prescription a riparian proprietor on the banks of a perennial public stream could be deprived of his rights by the action of an upper proprietor. It must be borne in mind that this is not a case of expensive works being put up interfering with a servitude with the knowledge and acquiescence of the person entitled to the servitude. In this case the wrong complained of was a gradually increasing one, and the plaintiff began to take steps when it became intolerable. While holding that delay on his part does not deprive him of the right to claim the free and uninterrupted flow of the water in the channel across his farm, I do not say that it will not materially affect the question of damages. Upon that point I may say that if the plaintiff had moved sooner the stream would in all probability never have become entirely obstructed, and his farm would not have been reduced to the state in which it now is. On the other hand, it must be remembered that it is more than eighteen months since the plaintiff complained, and nothing has been done by the defendants. There is no doubt that the plaintiff's farm has been injured by the diversion of the water and that he has suffered loss, but there is also proof that part of the loss must be ascribed to the state of the season during which losses were sustained generally by the farmers in the neighbourhood. Also considering that his own supineness has contributed to the loss, I think the damage claimed by him must be substantially reduced, and that the sum of £100 should be awarded him as fair compensation. The plaintiff also prays for an order compelling the defendants to remove the obstruction out of the bed of the channel, and restore the stream as it used to flow. This part of the case is not without some difficulty. The first question that arises is whether the plaintiff by lying by did not allow the evil complained of to grow to such proportions that he is now barred from obtaining the order asked for. As I said before, this is not a case in which the plaintiff acquiesced in a state of affairs which has continued to exist in the condition in which they were at the time when he refrained from taking steps to remedy them. He was undoubtedly guilty of some delay in taking steps to prevent a growing evil. But he cannot be said to have acquiesced in what happened in 1896, when he was ultimately deprived of all the water of the stream, which was still fairly strong in 1895. In the beginning of 1897 he requested the defendants to take steps to remove the obstructions, but since then nothing has been done by them. If the obstruction has now grown to such dimensions that it will prove a serious matter to remove it they have only themselves to thank. I do not think the plaintiff has lost his right to an injunction by acquiescence or lying by. It is argued that an injunction should not be granted, because the work would be very extensive, if not impossible. Upon the evidence at present before the Court, I am of opinion that the work required to be performed in removing the obstruction so far from being impossible will not be very extensive. Defendants themselves offered to turn back the stream if plaintiff paid half the costs. De Smidt thought it would be practicable to restore the water to the watercourse, but it would be an undertaking. In *Kerr on Injunctions*, I find the following passage on page 185: "When the plaintiff has proved his right to an injunction against a nuisance it is no part of the duty of the Court to inquire in what manner the defendant can best remove it. The plaintiff is entitled to an injunction at once, unless the removal of the injury is physically impossible, and it is the duty of the defendant to find his way out of the difficulty, whatever inconvenience or expense it may put him to. But where the difficulty of removing the injury is great the Court will suspend the operations of the injunction for a time, with liberty to the defendant to apply for an extension of time." Then it is said the order should not be granted, because it would necessitate the defendants going upon the land of a person not before the Court. That in itself is not an insurmountable difficulty, because it cannot be anticipated that the consent of the owners of the land will not be obtained. In fact some of the owners have already intimated that they would not object to the removal of the obstructions, even supposing they had any right to do so. As to Van Zyl, who was himself a party to the construction of the wall, and thus rendered himself liable to be joined in the suit, it cannot be anticipated that he will raise any objections. I think therefore the plaintiff is entitled to an injunction. In order to frame a definite order it will be necessary to determine what was the precise nature of the stream in controversy. Upon the evidence as a whole it would appear that about half the water coming down Oliphant's River passed on down the same channel, and the other half in the summer months found its way into the watercourse running down to the defendants' farm. The watercourse joins the Oliphant's River again near the lower boundary of Langfontein. It would seem that the only parties interested in the diversion of the water between the main channel and the outflow of the disputed channel are the plaintiff and the owners of Langfontein. Two of the owners of Langfontein, the Van der Merwes, said they would have no objection if half the stream is taken down through the outlet and the other half allowed to flow down the main channel. An order will therefore be granted ordering the defendants to remove the obstructions in the channel at the outflow from the Oliphant River of the watercourse in dispute; and to restore to its former course one-half of the water coming down the Oliphant River in the summer months. Nothing contained in this judgment will preclude the parties interested in the stream and the defendants from arriving at an amicable understanding as to the most convenient way in which, and most convenient course by which, the water may be diverted back to the plaintiff's farm. Although the difficulty of opening the former outlet was no bar to the plaintiff obtaining his order, he might find it advisable to agree to some other mode of attaining the same object, especially when it is borne in mind that the fact that the outflow from the river is situated on another person's property renders it difficult for him to protect himself from time to time from future changes in the condition of the outflow. Judgment will be for the plaintiff for £100 with costs, and defendants are ordered, on or before the 16th December, to remove the obstructions in the channel at the outflow from the Oliphant's River of the watercourse in dispute, and to restore to its former course one half of the water coming down the Oliphant's River in the summer months.

Solomon, J., said: I have had an opportunity of reading the judgment which has just been delivered, and I concur in that judgment. The case is one of very considerable importance. On the question as to whether the stream is perennial or not, I think the great weight of evidence shows that it is. I am satisfied that it is a perennial stream. Then the next question is that regarding the obstruction, whether it was the cause of the sand-bank by which the stream is now blocked. It is just as well to bear in mind what the original plea was, for it contained an admission of that very fact. In addition to the plea there is also the letter of the 17th March, 1897, which was written by the Secretary of the Divisional Council. With regard to that letter we must bear in mind that it was written upon evidence which Fryer received from Van Zyl. There is also the evidence of Bromley which showed him to be a very competent man. I am satisfied that his evidence is very important in coming to the consequence of the obstruction. I am further satisfied that the defendants are responsible for the obstruction which was placed in the stream. Now, we are asked to say that because the members of the Divisional Council know nothing about the matter, and the secretary knows nothing, the evidence of the others must be put aside. But as to Mr. Edye he was very probably absent at the meeting at which the matter was brought forward. As to Fryer, he is the man who wrote the letter of the 17th March. I think, therefore, that the Divisional Council are responsible. There is no satisfactory evidence to show that the plaintiff acquiesced in what was done. It is not clear that he knew what was being done. Even if he did it is not clear that he had any right to object as long as he got his water. I do think, however, that by lying by he has lost his right to some of the damages which he claims. I think also that the claim of damages has been somewhat exaggerated. I do think he has suffered £100 damages. As to the order for the removal of the sand-bank, I can quite understand that there may be circumstances in which the Court has refused to order a thing like this to be done. It is said it is not possible to remove the obstruction. I don't think there is any evidence of that. I agree with the order which has been made.

[Plaintiff's Attorney, P. M. Brink; Defendant's Attorneys, Messrs. Walker & Jacobsohn.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and Hon. Mr. Justice SOLOMON.]

BROWN V. BROWN. { 1898 Nov. 9th.

Marriage proved by duplicate certificate.

This was an action for restitution of conjugal rights, failing which for divorce.

Sir Henry Juta, Q.C., appeared for plaintiff.

The defendant was in default.

Florence Brown stated that she married Dr. Brown at Sea Point on April 22, 1897. She put in the duplicate original of her marriage certificate. Defendant was then a doctor practising at Fraserburg. Immediately after their marriage she and her husband proceeded to Fraserburg, driving from the station there in an open cart, although it was inclement weather. When they arrived at the village he told her that he was very badly in debt and also was addicted to taking morphia. He further stated that his practice was practically nil. Witness became ill through the drive in the inclement weather, and her husband gave her morphia. She left at the end of May, her husband telling her to go back to her mother. He gave her just enough money to take her home, and had given her nothing since. She had, with the exception of a short visit to England, resided with her mother ever since. Her husband left the Colony in November, 1897, and up to that time he had not communicated with her, although she had written to him. In September, 1897, she went to England, and while there she saw her husband at Cheadle, near Manchester, where he was being treated for taking morphia. He then told her she had better go home, as he did not want her. Since she had returned she had received a letter from him, which stated that he did not intend to come back to her. Since then she had not heard from him, nor had she written to him, and she did not know where he was. Witness was now supporting herself. There were no children of the marriage.

Sir Henry Juta said that personal service could be made upon the defendant, as they knew where he now was. He was employed by one of the steamship companies trading from Liverpool.

The Court granted an order calling upon the defendant to return to plaintiff or receive her on or before February 1, failing which to show cause by February 16 why a decree of divorce should not be granted.

[Plaintiff's Attorneys, Messrs. Findlay & Tait.]

SANDBACH V. SANDBACH AND KIRKMAN. { 1898. Nov. 9th.

This was an action in which Alfred Sandbach sued for a decree of divorce against his wife, Charlotte Sandbach, on the ground of her adultery with one Reginald Kirkman; against Kirkman the plaintiff claimed £500 damages by reason of such adultery.

Mr. Currey appeared for the plaintiff; the defendants were in default.

Francis Henry le Sueur, clerk in the Colonial Office, in charge of the marriage register, produced the marriage certificate.

Alfred Sandbach, the plaintiff, stated that he was a clerk at present residing at Kimberley. On June 9, 1896, he was married at Port Elizabeth to Charlotte Sandbach, the first defendant. Witness's wife came out from England to marry him. His suspicions were aroused by her behaviour within three months of their marriage. On September 19—a Tuesday—she left him, and did not return until late the following Saturday night. In November witness had to give up his house owing to financial difficulties, and went to Graham's Town. He put his wife in lodgings with a lady friend at Port Elizabeth. Afterwards he tried to get her to go with him to Graham's Town, but she refused. Witness then remained in Port Elizabeth, but did not reside with his wife. In consequence of information received he brought the present action.

By the Court: The co-defendant was a pianoforte tuner and music teacher.

Mrs. Otto stated that she kept a boarding-house at Somerset West. For five or six weeks, from July 4, 1897, a man calling himself Kirkman and the first named defendant (whom she recognised from a photograph produced) boarded together at her house. They lived as man and wife, but subsequently witness was told that they were not married, and she then told them to leave her place.

This closed the case for the plaintiff.

Maasdorp, J., pointed out that there was no evidence against the co-respondent Kirkman. There was evidence that at Somerset West Mrs. Sandbach committed adultery with someone calling himself Kirkman, but there was nothing to connect the co-respondent Reginald Kirkman with that man.

Mr. Currey: Personal service has been effected upon the co-respondent, and he has been subpœnaed to appear as a witness, which, however, he has not done. It is not, however, intended to press for damages to any extent against the co-respondent, as he is a man of no considerable means. I move for leave to amend the declaration so as to ask for divorce against the first defendant on the ground of her adultery with some person passing under the name of Kirkman.

The amendment was allowed.

Maasdorp, J., said: In this case the plaintiff sues the defendant for divorce upon the ground of her adultery with some person passing under the name of Kirkman' In so far the plaintiff has proved his case, because he has brought evidence to show that adultery was committed by defendant with some person called Kirkman at the house of Mrs. Otto, and consequently, on the ground of adultery, the divorce will be granted, with costs, against the first defendant. As to the case against the co-respondent, he is summoned in the action for the sum of £500 damages on the ground of adultery committed by him with Mrs. Sandbach. Now there is no evidence at al in this case that this defendant Reginald Kirkman ever committed adultery with Charlotte Sandbach, and consequently there must be absolution from the instance against him.

Mr. Justice Solomon concurred.

[Plaintiff's Attorney, C. W. Herold.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice) the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

BOON V. BOON. { 1898. Nov. 10th.

This was an action for restitution of conjugal rights, failing which for divorce.

The declaration of the plaintiff, Mrs. Boon, alleged that the defendant wrongfully and unlawfully neglected and refused to cohabit and associate with her, save and except that he provided means for her support. There was no issue of the marriage.

In his plea the defendant stated that the plaintiff brought no property into the estate, and that he had contributed all the assets. He further alleged that the plaintiff had been guilty of intemperance, had been on terms of undue familiarity with one Pollard, residing at Simon's Town, and that she had used foul and abusive language towards him and his children by a former marriage. He further stated that the marriage was an unhappy one, and that in April, 1896, she left him, without any fault on his part, and resided apart from him at Middelburg or elsewhere. In July last she returned to him, but behaved in a violent manner, on one occasion threatening him with a knife. He was perfectly willing that she should remain in the house, and he would support her, but cohabitation would be intolerable.

Mr. Currey appeared for the plaintiff.

Mr. Upington for the defendant.

Margaret Mary Boon, the plaintiff, stated her maiden name was Casey, but when she married defendant she was a widow, and her name was Tobin. She was married to defendant on November 11, 1895, at the Roman Catholic Church, Rondebosch. Mr. and Mrs. Pollard, who were her friends, and with whom she had resided before her marriage, were present. At that time witness had a son aged sixteen, and a daughter aged fifteen. The defendant had four daughters and three sons. About one of these sons (Harry) she had heard something previous to her marriage, and she arranged with defendant that that son should not reside in the house with them. In consequence of that promise she married defendant. After their marriage they first lived at Simon's Town. All the children, with the exception of the eldest son and Harry lived with them. There were continual bickerings, arising through quarrels between her children and the defendant's. She left her husband because defendant ordered her son to leave the house, and said that his son Harry was to return the following Monday. She went to Middelburg to Mr. E. de Waal as a nurse, and remained there for sixteen months. During that time she supported herself entirely. She then went to Port Elizabeth for a month's change. She then rejoined her children at Kimberley. She heard something that prevented her returning to her husband. She returned to Simon's Town in April last, and found a woman in defendant's house. She asked that the woman should be sent away, but was told that could not be done, as she had been engaged for three years as a nurse-housekeeper. The woman left for England in July with two of defendant's children, and witness then returned to her husband's house. She remained there five weeks, but defendant would not speak to her, and would have nothing to do with her. There was no truth whatever in the allegation that witness had been guilty of intemperance, or of undue familiarity with the man Pollard. Witness also traversed the other allegations as to violent conduct and abusive language towards her husband.

Cross-examined: She wrote the two postcards produced to the defendant after he had put a notice in the paper that he would not be responsible for her debts. One postcard began: "Poor old devil. So sorry you wasted the money on the notice. . . . You have not had a bill to pay for me since I had the misfortune to be your wife. . . . Your difficulties were concealed from me, and that was the cause of my leaving you, also your double dealing and lying tongue. I am able and willing to get my own living. . . You are waiting for me to ask to come back. W on, old man." That was written just after she left him. It was not a fact that she drank, nor that two dozen of stout were got for her each week. She had never been drunk in her life, not even on Christmas Day. The statements as to familiarity with Pollard were false. She had kissed both Mr. and Mrs. Pollard, but her husband kissed Mrs. Pollard—"quite in a friendly way." There had been no surreptitious kissing of Pollard in the garden. She was aware that the defendant had lived happily with his first wife for twenty-eight years, and she too had lived happily with her first husband, for he was not such a beast as defendant. When witness went to defendant's house at Simon's Town and refused to enter unless the woman, Mrs. Marshall, left, she used no abusive language.

Re-examined: Since witness's return in this year she had done everything she possibly could to bring about a reconciliation. Mrs. Marshall was ostensibly in the house as nurse-housekeeper, but witness was quite willing and able to take on those duties.

By the Court: Witness only found out after marriage that her husband was heavily in debt. She finally left him in August last, because he would not receive her as his wife.

Mr. N. F. de Waal, M.L.A., said he knew the plaintiff, who had been in his service as nurse at Middelburg for about sixteen months. He had formed the opinion that she was a splendid woman—as good a nurse as he ever had met—and absolutely trustworthy. He had voluntarily raised her salary, and had again engaged her to take care of his youngest child. She was quite reliable, sober, and trustworthy.

Cross-examined: Witness did not personally superintend the nursery, but in the country one knew better what was going on in the house than when living in the large towns. He would know if a woman in his house was addicted to intemperate habits.

Mr. Upington: Would you give the plaintiff £60 a year now, Mr. De Waal?

Witness: I would give her £75 if she came back to us.

Edmond John Tobin, the son of the plaintiff, stated that when his mother married Mr. Boon and went to Simon's Town, he went with them. He paid 18s. a week for his board and lodging. He corroborated his mother's evidence as to quarrels arising through the children, and as to his mother leaving the house in consequence of the threat of Harry's return. That was the main reason and the climax to all the quarrelling. Defendant also ordered the plaintiff to get rid of her lodger (meaning witness). Witness left with his sister and his mother.

Cross-examined: Until he was ordered out of the house witness was never mixed up in the quarrels. Witness remembered when Miss Boon went to Rondebosch; her father was cut up. There were then some high words between plaintiff and defendant, but witness never threatened to put six inches of cold steel into defendant. His mother was not intemperate nor did she use foul language.

Elizabeth Mary Tobin, daughter of the plaintiff, corroborated the evidence of her mother and brother as to the reasons for her mother leaving the house. Her mother was not of intemperate habits.

John Samuel Pollard, storeman, residing at Simon's Town, said he had known the plaintiff for over three years. The only familiarity he had ever committed with Mrs. Boon was to kiss her, but that was in the presence of the defendant, who kissed witness's wife. It was a regular kissing match.

Cross-examined: He had never kissed Mrs. Boon except in her husband's presence. It was a lie to say that he had ever kissed and cuddled her in the garden. She did not use bad language, nor was she intemperate. It was a customary thing for the defendant to kiss Mrs. Pollard, and for witness to kiss Mrs. Boon—just as friends.

Catherine Pollard, wife of the previous witness, stated that she knew the plaintiff and defendant. They were very great friends at one time. Witness had never had the slightest reason for complaint against her husband's conduct towards Mrs. Boon. She had never known plaintiff to be intemperate, nor was she addicted to the use of foul language..

Cross-examined: It would be a matter of impossibility for anything to be be carried on between Mr. and Mrs. Boon without witness knowing it.

By the Court: It was quite true that sometimes defendant had kissed witness, and that Mr. Pollard kissed plaintiff, but it was in a friendly manner, when they were all together and on parting.

The plaintiff, recalled by the Court, said that she left her husband's house in August last because she was so uncomfortable. Defendant was not treating her in any way as his wife. He would not even speak to her. He went away one week and was drinking from Monday till Saturday. He slept at a hotel that week.

De Villiers, C.J.: But you ask for restitution of conjugal rights. You ask him to receive you back, and you will go back to the same life.

The plaintiff: But I want him to restore to me my rights.

De Villiers, C.J.: But the Court cannot compel him to speak to you. If you go back he will probably treat you in the same way.

Charles Robert Elston Boon, the defendant, examined by Mr. Upington, said he was in the navy for twenty years, ending as chief engine-room artificer. In 1884 he retired on pension, and had been making his living as a contractor since. On Christmas Day, 1895, after his marriage to plaintiff, his wife was under the influence of drink, which was being circulated freely among the people in the house. Prior to that Christmas Day witness had been a teetotaller, but on that day he partook of liquor at his wife's invitation. Her son Ted became importunate in his attentions to witness's daughter, who was engaged to a young man in England, and witness told his wife she had better get rid of the son. He had seen Pollard kissing and hugging his (witness's) wife. He put the notice in the paper because he was afraid she would run him into debt. The woman Marshall was engaged by him as nurse to the children and as housekeeper, on a twelve months' engagement. He left Simon's Town an account of receiving an anonymous letter which led him to expect a scandal, and for his children's sake he left.

De Villiers, C.J., said it was perfectly clear these parties could never live happily together. Could they not agree as to a judicial separation?

Mr. Currey said he was asking for a division of property.

Witness, in reply to the Chief Justice, said his assets would be about £3,000, and his debts over £2,500. If he had to realise, he did not think there would be anything to divide. His wife had consumed as much as two dozen of stout in a week.

Cross-examined: Witness had never had any trouble in connection with the Freemasons. Witness received a pension of £51 14s, a year from the Admiralty.

By the Court: He had never had any improper relations with his housekeeper, Mrs. Marshall.

Cross-examination continued: Witness had never been drunk for a week on end. He would not deny that he had taken drink since he had known that woman.

De Villiers, C.J., suggested that the parties should come to some arrangement for a judicial separation, the defendant to pay the plaintiff £250.

The matter was allowed to stand over until the afternoon to allow the parties to consider that suggestion.

On returning to court in the afternoon, counsel stated that defendant had agreed to withdraw his opposition to the application for restitution of conjugal rights, and also to the Court ordering him to pay to the plaintiff the sum of £250 as her share of the estate, and a further sum of £25 towards the costs of the action in the event of his not receiving plaintiff back.

The Court granted a decree of restitution of conjugal rights, the defendant to be ordered to return to or receive the plaintiff back on or before November 30, failing which to show cause by December 12 next, why a decree of divorce should not be granted, and why he should not pay the plaintiff a sum of £250, and a further sum of £25 towards her costs.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

STANDARD BANK V. DU PLOOY AND ANOTHER. { 1898. Nov. 10th.

Mr. Gardiner asked that the provisional order of sequestration of the defendants, estates be discharged.

Sir H. Juta appeared for the defendants.

The order was discharged and the summons ordered by consent to be amended and to stand for summons in an action for debt to be instituted.

Costs to be costs in the cause.

REHABILITATION. { 1898. Nov. 10th.

Mr Joubert applied for the rehabilitation of Barend Johannes Vorster van Blerk.

The order was granted.

ILLIQUID ROLL.

PIENAAR V. A. MCGREGOR.

Mr. Benjamin applied for judgment under Rule 329 for the sum of £125, debt.

Granted.

MARTELL AND CO. V. EDMUND MARTELL AND CO., AND HANSEN AND SCHRADER.

Mr. Molteno moved for judgment in terms of the consent paper signed by the second-named defendants.

Granted.

GENERAL MOTIONS.

IN THE MATTER OF THE PETITION OF JOHN PETER WILDREDGE.

Mr. Upington moved that the rule *nisi* granted under the Derelict Lands Act be made absolute.

Granted.

IN THE MATTER OF THE PETITION OF STEPHEN BENJAMIN MATTHEW.

This was an application for an order to amend certain title deeds in connection with certain lots of land in the township of Umtata.

Mr. Upington appeared for the petitioner.

Mr. Sheil, Q.C., said he appeared for the Secretary for Agriculture to consent to the application.

The order was granted.

IN THE INSOLVENT ESTATE OF CHRISTIAN J. BRUYNS.

Mr. Buchanan moved under the Insolvent Ordinance for the appointment of a commissioner to take certain evidence.

Granted, Mr. Benjamin being appointed commissioner.

SPRECKLEY V. SPRECKLEY.

Mr. Benjamin moved for an order authorising the publication of the citation, intendit, and notice of trial of the action in an abbreviated form. He also asked for an extension of the return day to January 12.

The order was granted.

IN THE ESTATE OF THE LATE EDWARD FREDERICK STEVENS.

Mr. Buchanan moved that the executor testamentary in the estate be granted leave to raise a certain sum of money on mortgage. The estate was valued at £1,400, and it was desired to raise £400 on mortgage. The Master recommended the granting of the application.

The order was granted.

IN THE MATTER OF THE PETITION OF GEORGE EDWARD VICKERS.

Sir Henry Juta, Q.C., moved for leave to the petitioner to raise a certain sum of money on mortgage of property registered in trust for his minor child at a time when it was the only child of his marriage. From the petition it appeared that in February, 1891, the petitioner had bought a certain erf and had it transferred into his name in trust for his minor daughter. At that time he was in fairly good circumstances, but had since met with reverses and could not support his wife and children, there being now several additional children of the marriage in addition to the minor child in question. The property had been bought originally for £200. Since petitioner had transferred that property he had spent on it between £300 and £400, and its present value was £550. The money to be raised on mortgage was to be devoted to the maintenance of petitioner's wife and children.

De Villiers, C.J., said: If this question were entirely one between the father and this minor child, I should certainly refuse this order, because the father has given the property to the child, and has built upon it, and he must be presumed to have intended that the child should be the *bona fide* owner of the property transferred to it. But we have to deal in this matter not so much with the father and mother as with the other children, and they must be maintained and educated in some way or other, and for their sake the Court will make the order asked for.

IN THE MATTER OF THE PETITION OF GEORGE FREDERICK HENNING.

Mr. Buchanan moved that the petitioner be allowed to sue his wife *in forma pauperis* for restitution of conjugal rights. The petitioner was a farmer residing in the district of Calvinia, and in 1894 married a widow. They lived happily together for two years, and then they went on a visit to the Clanwilliam district. At his wife's request applicant returned alone at the expiration of two days. She did not follow after him as she promised, and for eighteen months he received no communication from her, and as he was very poor he could not incur the expense of going to fetch her unless he was certain she would return. In reply to a letter from him, she had written that it was impossible for her to return after his conduct, and further, he was unable to maintain her. The petitioner was sixty years of age.

De Villiers, C.J., said that the practice of coming to the Court and asking for leave to sue *in forma pauperis* in these actions for restitution of conjugal rights had become such a perfect scandal that the Court had had to put a stop to it. The Court had laid down that special circumstances must be proved before it would grant leave to sue *in forma pauperis*. There were no special circumstances in the present case, and if the man was in earnest over the matter he would be able to bring the action in the ordinary way. The application was refused.

MARSHALL V. AFRICAN BANKING CORPORATION. { 1898. Nov. 10th.

Promoter of company—Contract—Exception.

This was an argument on exceptions to the declaration.

The declaration was as follows :

1. The plaintiff is an engineer, residing at Cape Town ; the defendant is a duly incorporated company, carrying on business in the Colony and elsewhere as bankers under the name of the African Banking Corporation (Limited), having its head office in Cape Town and branches in various towns in the Colony and in the South African Republic.

2. In or about the month of April, 1898, the plaintiff entered into certain negotiations for the promotion and starting of a duly incorporated company for the purpose of carrying on the business of butchers, both wholesale and retail, and importers and dealers in foodstuffs generally, and for the further purpose of erecting and working cold storage chambers in connection therewith, and of taking over from plaintiff, who was to be a director of the said company, certain options of contract obtained from sundry persons in relation to the aforesaid purposes.

3. On or about the 15th April, 1898, it was agreed between the plaintiff, as promoter of the aforesaid company, and one Allan Wright, acting for and on behalf of the defendant corporation, that in consideration of the plaintiff presently appointing the defendant corporation as the bankers of the aforesaid company, and getting the company, when duly incorporated, to confirm the said appointment, the defendant corporation would receive applications by the public for shares in the aforesaid company, and also the deposit money payable on such applications, at the head office of the corporation in Cape Town and also at the various branch offices throughout the Colony and the South African Republic.

4. The defendant corporation further agreed and undertook to distribute copies of the prospectus of the company and forms of application for shares, when provided by the company, through the head office and the various branch offices as before mentioned.

5. Thereafter on the 18th April, 1898, a company, called the South African Food Supply and Cold Storage Company (Limited), was duly incorporated under the provisions of Act 25 of 1892, for the purposes in paragraph 2 hereof mentioned, and the defendant corporation was duly appointed bankers of the said company, through the instrumentality of the plaintiff.

6. A prospectus was, after being approved of by the defendant corporation, issued by the company on the 29th April, 1898, and two thousand copies thereof, together with forms of application for shares, were furnished the defendant corporation on the following day for distribution as aforesaid.

7. The defendant corporation wrongfully, unlawfully, and in breach of the contract, in paragraphs 3 and 4 hereof mentioned, not only failed and neglected to send the copies of the prospectus and the application forms to its various branches, and to distribute them through its head office and the various branches, but also refused to accept and receive applications by the public for shares and deposit money in connection therewith when tendered to it, and further, advised many applicants not to take shares in the said company.

8. By reason of the aforesaid wrongful and unlawful conduct and breach of contract by defendant corporation, the plaintiff has suffered damages in the sum of £25,000. Wherefore plaintiff claims: (*a*) Payment of the sum of £25,000 as and for damages as aforesaid ; (*b*) alternative relief ; (*c*) costs of suit.

The defendant excepted that the declaration was bad on the following grounds :

(*a*) It does not appear from the declaration that the plaintiff has been in any way damnified.

(*b*) The acts, matters, and things alleged to have been done by the defendant corporation do not give rise to any ground of action on the part of the plaintiff, (*c*) The declaration does not disclose and set forth any right, title, and interest which the said plaintiff, suing in his individual capacity, has in bringing this suit, and that therefore, the *exceptio non qualificatae personae* is herein well taken against the declaration.

(*d*) The declaration is otherwise vague, ambiguous, and embarrassing.

Mr. Buchanan for the plaintiff.

Mr. McGregor for the defendant company.

Mr. McGregor: There are no facts set out which damnify the plaintiff though there might be damage to the company. The promoter is in a fiduciary position, so any profits made by him go to the company. *Mayor and Town Council of East London* v. *Williams* (2 E.D.C., p. 179). There is no allegation of any agreement which would allow the plaintiff to claim against the company. There is nothing to connect plaintiff with the company except the allegation that he was to become a director. There is no consideration alleged, and the exception is sufficiently general to cover that ground.

Mr. Buchanan: A promise is a good consideration for a promise, and a promise is alleged. The promoter is the proper person to sue. There is nothing to show that the company adopted the plaintiff's contract. The fact that defendants were appointed bankers is merely the consideration. *Hamilton's Manual of Company Laws* (p. 7) has a definition of a promoter as a person who as principal procures the formation or floating of a company: also p. 16, he is personally liable upon all contracts made with him on behalf of an intended company; although he may come under liability to a company by reason of his acts before its incorporation, he cannot by such acts acquire any rights against the company, unless the company takes the benefit of them. The adoption of his contracts by the company must be an express adoption.

[De Villiers, C.J.: If one person stipulates for the benefit of another, and that other afterwards takes the benefit of the stipulation, it has been held here that the latter only can sue and not the former.]

But that is not the law of England, and in the case of companies the Court will follow English law. *Healey on Company Law* (p. 35). The promoter is not the agent of the company. *Lindley on Company Law* (pp. 148, 149); *Kelner* v. *Baxter* (L.R., 2 C.P., p. 174): *In re Empress Engineering Co.* (16 Ch.D., p. 125): *Scott* v. *Lord Ebury* (L.R., 2 C.P., p. 255); *Touche* v. *Metropolitan Warehousing Co.* (6 Ch., p. 671).

Mr. McGregor in reply referred to *Visser* v. *London and Jagersfontein D.M. Co.* (1 Gregorowski, O.F.S. Rep., p. 8).

De Villiers, C.J., said: I confess that, after carefully reading and re-reading this declaration, it is very difficult to see what the real grounds of this action are, and also to see exactly the manner in which the plaintiff has sustained damages. At the same time the Court is not prepared now to prevent the plaintiff going to trial, because it is just possible that upon hearing further argument and hearing the evidence the Court may be satisfied that there are sufficient grounds, although these are not disclosed in the declaration. It is quite true that it does not appear clear from this declaration that this contract was not made on behalf of the company and for the benefit of the company, and not for the benefit of the plaintiff, but it is just possible that when the Court comes to look more carefully into the whole thing, and comes to understand the true nature of the contract between the plaintiff and the defendant, it may then appear that it was a contract wholly for the benefit of the plaintiff and not for the benefit of the company, and if that appears, then of course one ground of objection taken up by the defendant would disappear. Then with regard to damages, as the declaration stands I do not see how the plaintiff can have sustained damages by reason of the refusal of the defendant corporation to receive certain applications by the public for shares, and to accept certain deposit money, but possibly also when the evidence is heard the points which are at present obscure may be cleared up. Therefore to uphold these exceptions may possibly do injustice, and I think that on the whole it is better that the case should go to trial, when the Court will be in a better position to judge as to whether the legal objections taken up were good. The Court will therefore make no order upon the exceptions, but will order the case to go to trial, and then also the Court will also decide as to the question of costs.

With regard to the application for the appointment of a commission to take the evidence of Mr. Wright, at present in England, the Court after hearing counsel decided that the evidence of the plaintiff and his witness as well as that for the defence, with the exception of Mr. Wright's, be heard on November 26, and that if the Court then thinks the evidence of Mr. Wright essential to the defence, it can be heard during the February term, it being stated that he will return to South Africa in January.

[Plaintiff's Attorney, S. J. Mostert; Defendant's Attorneys, Messrs. Sauer & Standen.]

DE VILLIERS AND GOUWS V. VANES AND LEE. { 1898. Nov. 10th.

This was an application by the petitioners for a day to be fixed for the hearing of the petition lodged by them against the return of the respondents as members of the House of Assembly for the division of Uitenhage.

Mr. Searle, Q.C. (with whom was Mr. Solomon, A.G.), appeared for the petitioners.

Mr. Graham, Q.C. (with whom was Mr. Innes, Q.C.), for the respondents:

The Court fixed the 19th January as the day of trial.

BURTON V. RHODES AND HILL. { 1898. Nov. 10th.

Election petition -Time for presentation —Act 9 of 1893, section 4, sub-section 2—Constitution Ordinance sections 56, 57.

A proclamation under section 57 of the Constitution Ordinance, setting out that, whereas a certain candidate for the House of Assembly has been returned for two electoral divisions, and has elected to represent one of those divisions, a fresh election shall therefore be held in the other division is not such a proclamation as is referred to in Act 9 of 1883, section 4, sub-section 2.

This was an application by the petitioner for a day to be fixed for the hearing of the petition lodged by him against the return of the respondents as members of the House of Assembly for the division of Barkly West. There was also a counter application on notice to the petitioner calling on him to show cause why the petition should not be removed from the list by reason of it not having been presented within forty-two days as required by section 4 of Act 9 of 1883, after the result of the Barkly West Election had been proclaimed in the "Government Gazette," and also to show cause why paragraphs (*a*) and (*b*) of the schedule to the petition should not be expunged by reason of their not showing any valid objection to the return of the said respondents.

The affidavit of J. B. Kayser, respondent Rhodes's attorney, alleged that the petition was lodged with the Registrar on October 17, 1898, at 3.45 p.m. It referred also to Proclamation 262, dated September 8, 1898 and these were attached.

The Proclamation of the 8th September, referred in the preamble to the 57th section of the Constitution Ordinance and then proceeded, "And whereas I have received from the returning officers for the electoral divisions of Namaqualand and Barkly West respectively the names of the respective members elected to represent the said electoral divisions of Namaqualand and Barkly West, that is to say:

"For the electoral division of Namaqualand, Cecil John Rhodes, Francis Oats.

"For the electoral division of Barkly West, Cecil John Rhodes, James Alfred Hill.

"And whereas the said Cecil John Rhodes has, by writing under his hand, elected to represent the electoral division of Barkly West.

"And whereas it is necessary that a member of the House of Assembly should be elected for the electoral division of Namaqualand in the place and stead of the said Cecil John Rhodes.

"Now, therefore, &c.," it proceeded to order a fresh election for the electoral division of Namaqualand.

The Proclamation of the 15th September referred to Act 9 of 1892, section 37, and to the Proclamation of the 8th September above, and proceeded "Now, therefore, in pursuance of the provisions of section 56 of the Ordinance for constituting a Parliament for this colony, I do hereby proclaim, declare, and make known that the names of the respective members elected by the several electoral divisions aforesaid, are as follows, that is to say:" Here followed a list of all the divisions and the members elected, including:

For the electoral division of Barkly West, Cecil John Rhodes, Francis Oats.

Paragraphs (*a*) and (*b*) of the schedule charged the respondents and their agents with the publication in the "Barkly Diggers' News" on August 27 of an advertisement announcing that Messrs. Rhodes and Hill, the Progressive candidates, had arranged with the owners to have the diggings on the Vaal River Estate thrown open. They charged them further with causing circulars to the same effect to be printed and distributed at certain places throughout the division of Barkly West.

Sir H. Juta, Q.C., appeared for the petitioners.

Mr. Graham, Q.C. (with whom was Mr. Innes, Q.C.), for the respondent Rhodes

Mr. Searle, Q.C., for the respondent Hill.

Mr. Graham : The question is whether the forty-two days required by Act 9 of 1883, section 4, sub-section 2, should run from the Proclamation of September 8 or that of September 15. We say that it runs from the first proclamation, which was made under section 57 of the Constitution Ordinance.

Sir H. Juta : The Constitution Ordinance only provides for one proclamation of the election. The Proclamation of September 8 does not proclaim the election. The preamble is not the proclamation.

De Villiers, C.J., said : The second subsection of the fourth section of Act 9 of 1883 fixes the time within which an election petition must be presented. It shall be presented within forty-two days after the result of an election has been proclaimed in the "Government Gazette." Now when was the result of the election proclaimed in the "Gazette"? Clearly only by the proclamation of September 15, for then only was that proclamation as to the election of the different members who had been elected during that election issued. It is true that on September 8 there was a proclamation, but the object of that proclamation was to have a fresh election in Namaqualand, and then it was declared that the respondent had elected to stand for Barkly West. But his election does not amount to such a proclamation as is referred to in the fifty-sixth section of the Constitution Ordinance and in the fourth section of the Act of 1893. It is quite clear therefore that the petition must be presented within forty-two days of September 15, and not of September 8.

Mr. Searle: Paragraphs (*a*) and (*b*) disclose no lawful and valid objection to the return of the respondents. A circular of this kind cannot come within the Bribery Acts.

[De Villiers, C.J.: To whom does the Vaal River Estate belong ?]

Mr. Searle : I understand it belongs to independent parties.

Sir H. Juta : We do not admit that.

De Villiers, C.J. : That is an important point.

Mr. Searle : I understood that that was not denied, and there is nothing in the petition to lead us to suppose otherwise, but under the circumstances it may be better that the objection should stand over until the trial.

The Court fixed the 4th January as the date of trial and allowed the petitioner the costs of opposition.

[Petitioner's Attorney, V. A. van der Byl ; Respondents' Attorneys, Messrs. Van Zyl & Buissinné.]

KYLE AND OTHERS v. KRIGE. { 1898. Nov. 10th.

This was an application by the petitioners for a day to be fixed for the hearing of the petition lodged by them against the return of the respondent as a member of the House of Assembly for the division of Stellenbosch.

Mr. Graham, Q.C. (with whom was Mr. Innes, Q.C.), for the petitioners.

Mr. Searle, Q.C., for the respondent.

Mr. Graham : It is desired that the 10th January be fixed, that being the day upon which the petition of *De Waal* v. *Sivewright*, also relating to the Stellenbosch election, is to be heard. Act 9 of 1883, section 13, provides for the bracketing together of petitions relating to the same election or returns.

Mr. Searle : That section refers only to more than one petition against the same person.

The Court fixed the 13th January as the date of trial.

STIGLINGH v. RHODES. { 1898. Nov. 10th.

This was an argument on exception taken to the plea of the defendant.

The action was for £2,000 damages for slander.

The declaration alleged that plaintiff and defendant were Parliamentary candidates for Barkly West, and that on a certain day before the polling, at the Diggers' Hall, a meeting of electors was held at which defendant made a speech, in which certain statements were made which the plaintiff alleged were libellous.

These statements were set out at length.

The defendant in his plea admitted that at the time and place and under the circumstances referred to he used words of similar purport to those complained of in the affidavit, but he put plaintiff to the proof of the exact expressions employed, and more particularly he said with reference to the second last sentence, that words were used by him "to express the following thought": "Well, then we have the plain fact that in our own constituency a man has arrived from the Transvaal to fight our election with moneys which we may fairly presume were provided out of the Transvaal revenue." He denied the other allegations in the same paragraph, and said the words used by him were true in substance and in fact, and were justified as being spoken for the public benefit.

Sir H. Juta, Q.C. (with him Mr. McGregor), was for the plaintiff: Mr. Graham, Q.C. (with him Mr. Innes, Q.C., and Mr. Sampson, Q.C.), appeared for the defendant.

[De Villiers, C.J.: Which words does the defendant say were true?]

Sir H. Juta: None of them. He puts us to the proof of all of them, and whichever words the Court may find he used he says he will justify.

Mr. Graham: There are portions of the plea which must be altered. The words "to express the following thought" should be eliminated, so as to plead the actual words instead of the thought.

Maasdorp, J.: He denies the words were used in the declaration?

Mr. Graham: He admits that he used words of similar purport.

De Villiers, C.J.: An opportunity must be given to plaintiff to consider whether he will accept the amendment or not.

Sir H. Juta: The defendant denies the words, and then he justifies them. Let him state that he justifies the words set out in the declaration, and the plaintiff will accept that.

Mr. Graham: We do not wish to eliminate that part of the plea in which defendant admits using words of similar import.

Sir H. Juta: If the defendant admits the remainder of the declaration, and does not justify the words of similar import, there is no defence, and plaintiff asks for judgment. Even if the words sought to be justified were cut out, there is still libel enough in the remainder of the words alleged to have been uttered, and which are not denied nor justified.

Mr. Graham: In this plea we justify the particular words in the second last sentence, but there is generally a plea of justification of all words used. The defendant has made an electioneering speech, and how can any man of the world be expected to remember what he said in an electioneering speech?

De Villiers, C.J., said the exception was allowed, with costs, and the amendment was allowed. It was competent for the plaintiff still to accept the plea as amended.

[Plaintiff's Attorney, V. A. van der Byl; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Justice SOLOMON.]

MORGAN v. HIDDINGH { 1898. Nov. 11th.

This was an action for damages, brought by May Morgan against Jonas Michiel Frederick Hiddingh.

The plaintiff in her declaration stated that she was a nurse in the employ of the defendant and his wife. In February she was assaulted by Mrs. Hiddingh, and thereupon took proceedings, but while these were being instituted, Mr. Hiddingh took passage for himself and his wife for England, upon which steps were taken to prevent their leaving. On March 9 a meeting took place between plaintiff's attorney, defendant's attorney, and defendant, at which the agreement to pay the plaintiff £27 was made. Defendant promised to give a cheque for that amount, but instead of doing so went away by the steamer. The declaration claimed £60 damage.

The plea denied the assault, and while admitting that the meeting mentioned was held, denied that any compromise was come to.

Sir Henry Juta, Q.C., appeared for the plaintiff.

Mr. Graham, Q.C., appeared for the defendant.

Mr. Graham read an affidavit made by Mr. Reid, attorney, detailing the steps taken in the case. A certificate from a doctor in France was enclosed, certifying that Mr. Hiddingh's health was such that he would be absolutely unable to attend Court before

May next year. Mr. Graham stated that unless a postponement was granted it would be impossible properly to defend the case.

David Tennant, an attorney of the Supreme Court, said he was acting in March last as attorney for the plaintiff. Proceedings had been instituted against defendant, and witness hearing that he was leaving for England threatened to take steps to prevent him. Thereupon defendant's attorney, Mr. Silberbauer, asked witness to attend a meeting. Witness did so, and there were present defendant, Mr. Silberbauer, and witness. An agreement was arrived at by which defendant was to pay the plaintiff £27, in consideration of the latter dropping all proceedings. Before the cheque was made out, however, defendant left the room, promising to be back at 2.30. He did not return, and witness waited until three o'clock, when he took out a writ, and had the mail steamer Scot searched as far as possible, but Mr. Hiddingh could not be found. Neither witness nor his client had ever received the amount agreed upon.

Cross-examined: Defendant must have been on board.

Coenrad Christian Silberbauer, an attorney of the Supreme Court, deposed that in March last he was acting as attorney for Mr. Hiddingh. At the meeting referred to by Mr. Tennant an agreement was made whereby Mr. Hiddingh was to pay plaintiff £27 in consideration of all proceedings against him being stopped.

Sir H. Juta said he did not ask for more than the amount agreed upon.

De Villiers, C.J., said: It is quite clear that a settlement was arrived at, in consideration of which the proceedings were withdrawn. The defendant denies that in his affidavit. It was for defendant's own satisfaction that his affidavit was read, but I do not think it affects the case. His own attorney admits the settlement, and therefore the judgment of the Court will be for plaintiff for £27, with costs incurred after the settlement.

[Plaintiff's Attorney, D. Tennant; Defendant's Attorneys, Messrs. J. & H. Reid & Nephew.]

REGINA V. DANIEL SMITH. { 1898. Nov. 11th.

Diamond Trade Act 48 of 1882, sections 2, 58 – Servant — Theft— *Autrefois acquit.*

An after-sorter employed in a diamond-mine who receives no regular wages, but is paid a percentage upon his finds and is entitled to come and go when he likes, is not a servant within the meaning of Act 48 of 1882, section 58, and may legally be charged under section 2 of that Act.

This was an appeal from the conviction of the appellant by the Special Court, Kimberley, constituted under the Diamond Trade Act, 1882.

The appellant was charged with the crime of contravening section 2 of Act 48 of 1882, in that upon or about the 10th June, 1898, and at or near Bultfontein, in the district of Kimberley, the said Daniel Smith did wrongfully and unlawfully have in his possession seventy-three rough and uncut diamonds, and is and was on the day aforesaid unable to account satisfactorily for, or to prove his right to the possession of the same, or to produce a proper permit for the same in accordance with the provisions of the aforesaid Act.

The prisoner being arraigned pleaded *autrefois acquit* (prisoner having already, in regard to the same facts, been charged with and acquitted of a contravention of section 58).

This plea having been overruled, the prisoner pleaded not guilty.

The evidence went to show that the prisoner, who was an after-sorter working at Bultfontein, had been secreting diamonds in a small bottle for some days before his arrest. The arrest was effected on the road between Bultfontein and Wesselton, a small bottle containing seventy-three diamonds, weighing about eight carats, being found in his possession, The evidence showed further that prisoner was not employed for any fixed period, but could come and go when he liked, and was paid according to the number of carats found by him. After the evidence for the prosecution had closed, the prisoner withdrew his plea of not guilty, and pleaded guilty. The Court passed a sentence of thirty months' hard labour.

The Judge-President gave the following reasons: In this case the accused first pleaded *autrefois acquit* on the ground that he had already, in regard to the same facts, been charged with, and acquitted of, contravening section 58 of the Act. I understand that the appeal is based on the ground that this plea should have been allowed. It may be explained that at the previous sitting of the Court the prisoner had been charged with theft of these diamonds under section 58, and it then became necessary to prove that he was in the service of one Hunt. Hunt's evidence failed to establish this, and he was therefore discharged. With regard to the plea subsequently tendered, the Court was of opinion that an acquittal on a charge of theft under section 58 did not preclude a subsequent prosecution on a charge of unlawful possession under section 2.

The prisoner now appealed.

Mr. Jones for the appellant: The prisoner was in jeopardy at the first trial and could have been convicted inasmuch as he was a servant within the intention of Act 48 of 1882, section 58. The mere fact that he was to be paid by a percentage of his finds does not take him out of the category of servants. "Servant" is wide: it covers any description of servant (section 62). Section 58 is taken from Proclamation 14 of 1872 (G.W.) which gives a wider interpretation than Act 15 of 1856. Proclamation 11 of 1880 also shows that "servant" was intended to include all persons working in a mine except managers or sub-managers. When the prisoner was working he was a servant, and by English law could be found guilty of embezzlement. *Regina* v. *Hartley* (R. and R., C.C., p. 139); (*Regina* v. *Spencer* (R. and R., C.C., p. 299). He was under the control of his employer: it could be no other contract than one of service, there was a man in charge and he could only work at the mine—he could not take his work away. In *Regina* v. *Johns* (J. 3, p. 340) it was held that section 2 did not apply to labourers in a mine; sorters are in the same position with regard to the diamonds they find: therefore section 58 was the section under which he should have been convicted.

[Solomon, J.: Is not the second indictment distinct from the first so as to require other evidence? That is, evidence merely of unlawful possession and giving no satisfactory account of the possession.]

The appellant was not asked to account for his possession: if asked he would have replied that the diamonds were Hunt's, and that would have been a satisfactory explanation as he had a lawful possession for Hunt.

Mr. Sheil, Q.C., for the Crown, was not called upon.

De Villiers, C.J., said: The prisoner was first charged with contravening the 58th section of the Act, but after taking some evidence it appeared that he was not a servant, and thereupon the Court dismissed the charge. Then the prisoner was charged with a contravention of the second section of the Act, which makes it unlawful for any person to be found in the possession of any rough or uncut diamonds without being able to account satisfactorily for the same, and upon this he was convicted and sentenced, and before he was sentenced he actually withdrew the plea of not guilty, and pleaded guilty. Perhaps that may not debar him from raising the ingenious defence now raised on his behalf which is that he really was in jeopardy on his first trial because he was a servant, and should have been convicted. In my opinion this defence falls to the ground entirely, because the evidence given in the first trial, as well as the evidence in the second trial, clearly shows that the man could not be regarded as a servant in the sense here required. Mr. Hunt says, with regard to appellant: "He was an after-sorter. I paid them no wages. They worked for me on commission, and were paid a percentage. They could come when they liked and go when they liked." Under these circumstances, the Court was quite justified in putting a strict construction upon the 58th section, and in finding that he was not, in the sense intended by the Act, a servant. Therefore, taking that view of the Act, the Court acquitted him, and having done so, I think he could be legally charged under the 2nd section, which refers to a different offence and requires evidence entirely different from the 58th section. The appeal must therefore be dismissed.

[Appellant's Attorney, Messrs. Findlay & Tait.]

REGINA V. LEONARD. { 1898. Nov. 11th.

Theft.

This was an appeal from a sentence passed upon the appellant by the Assistant Resident Magistrate of Cape Town.

The appellant was charged with the crime of theft, in that upon or about the 14th day of August, 1898, and at Cape Town, she did wrongfully and unlawfully steal a purse containing between £13 and £14, the property of the prosecutor.

A preliminary examination was taken against the accused, and the case was remitted for trial by the Attorney-General under Act 43 of 1885, The evidence for the prosecution showed that on Sunday night, the 14th August, the accused accosted the prosecutor three times, once in St. George's-street, once in Strand-street, and the third time in Waterkant-street.

In the last-mentioned street the accused caught hold of his coat and pulled him about, urging him to go home with her.

To get rid of her the prosecutor gave her 2s. 6d. and she went away, and almost immediately afterwards he missed his purse containing £13 or £14 from the inside pocket of his coat.

The accused was then arrested, and on serch being made the prosecutor's purse was found where he and the accused had been standing.

There was no money in the purse when it was found. At the police-station the accused was searched, and a sum of £12 in gold and some odd shillings was found in her possession.

For the defence, evidence was called to show that on the day before the alleged theft the accused had some £8 or £9 in gold in her purse in addition to some silver.

The accused stated that on the night in question she left her house with £12.4s. 9d.

The Assistant Resident Magistrate found the accused guilty, and sentenced her to four months' imprisonment with hard labour.

From this sentence she now appealed.

Sir H. Juta, Q.C., was heard in support of the appeal.

Mr. Sheil, Q.C., for the Crown.

After argument.

De Villiers, C.J., said: It is not necessary to hear Mr. Sheil in this case on behalf of the Crown. The Magistrate had to decide a pure question of fact, and hearing the evidence he came to the conclusion that this woman was guilty. If this had been a case coming before a jury no judge would have been prepared to tell the jury that there was no evidence at all against the prisoner. The Court would put the whole case before the jury pointing out the circumstances to be considered in favour of the prisoner, and would have left the jury to draw their own conclusions, but no Court would have held that there was no evidence to justify any reasonable person in convicting the prisoner. Now, I take it for granted that in this case the prosecutor did lose a purse containing a sum of money. It is not likely that a respectable man, a married man, would have trumped up a charge like this. He would have wished to keep a case like this out of court. It may be that his conduct was not that of a perfectly moral man, but at the same time it does not follow that he is going to commit perjury on that account, and although he might have smoothed over his own conduct, still in the main his evidence seemed to be fairly truthful. In his evidence he states that after he had met the appellant she asked him several times to go home with her. The third time he met her was in Waterkant-street, opposite Garlick's corner, and she then caught hold of him by the coat, and pulled him about, urging him to go home with her. He told her to go away, and at last gave her half-a-crown to go away. She went at once, and immediately afterwards on his putting his hand into his pocket he found that his purse was gone. He immediately went after her, she was then about sixty yards away, and asked her to return the purse, but she said she had not got it. He continued to ask her, and followed her to Waterkant-street, to the side-walk of Garlick's building, and caught hold of her, when she said she would scream if he did not go away. Now, it is quite true that if the prisoner stole the purse she must have done so at the time she caught hold of his coat and pulled him about. There is no explanation as to who else could possibly have done it, unless this man committed perjury, for he does not appear to have come in contact with any other women that night. It has been suggested that the other two women might have had something to do with it. Their conduct shows clearly they had nothing to do with it, because after they had gone away they came back again, and went up to the place and found the purse. Another point against the prisoner was that the purse was found at the spot where the parties had been while she was being held by the prosecutor. Therefore she must have dropped the purse. Then it was said that the amount of money which was in prosecutor's purse was not found in possession of the prisoner, but that was not conclusive, because it was quite possible for her while struggling to deftly throw away a few pounds. With all the noise going on she could then easily shoot some money away some distance without attracting anyone's notice. It was then said why should she not shoot away the whole or a large part to make herself safe. Well, that was not necessary. If she got rid of a couple of pounds that would serve her purpose, because the whole amount not being found on her the argument would be very strong that she could not possibly be guilty. If there had been any suggestion as to any other person being guilty, I should be prepared to consider why the Court might not in this case go behind the Magistrate's verdict, but there is really no explanation as to how the money could have been stolen by anyone except the prisoner. If the prosecutor's case is correct, and I think it is, then there is evidence to satisfy a reasonable person that the prisoner was guilty. Under these circumstances, I am of opinion that the appeal must be dismissed.

Maasdorp, J., concurred.

Solomon, J., also concurred, and in doing so said that he felt there was considerable force in some of the arguments addressed to the Court by Sir Henry Juta, but at the same time he had come to the conclusion that this was essentially a jury case, a case in which the Magistrate heard the witnesses on both sides, and determined which he believed. If the Magistrate believed the prosecutor and the witnesses who gave evidence on his behalf, it was difficult to see how he could come to any other conclusion than that there was no other person guilty, because there was no other explanation of the prosecutor having lost this money except that the prisoner took it while she was pulling him about by the coat. Apparently the Magistrate preferred to believe the witnesses for the prosecution, and did not believe the evidence given by the witnesses for the defence, and he (Mr. Justice Solomon) did not see how they could possibly go behind the decision given by the Magistrate, who had the witnesses before him.

[Appellant's Attorney, A. Kenealy.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

WEIR AND CO. V. COLONIAL GOVERNMENT. { 1898. Nov. 14th.

Fees in Magistrate's Court—Rule of Court 308.

Under Rule 308a, section 2, the fee for every hearing of a case in a Magistrate's Court is two pence in the pound, but the fee is in no case to exceed three shillings and four pence. Under section 3 the fee for hearing is reduced one half in certain cases.

Held, *that the reduction applies also to the maximum fixed by the 2nd section, and that consequently no more than one shilling and eight pence can be charged under the 3rd section.*

This was an appeal from a judgment of the Acting Resident Magistrate of King William's Town in an action in which the present respondents, plaintiffs in the Court below, sued the appellants for the sum of 1s. 8d., being, as the summons alleged, the balance of amount due and payable under Rule of Court 308, sub-sections 2 and 3, as hearing fees in the matter of the said defendants v. Sokopo for the recovery of the sum of £120 11s. 9d., less the sum of £20 11s. 9d. for goods sold and delivered, in which case provisional judgment was given by the Resident Magistrate of King William's Town for the said defendants on the 15th December, 1896, in terms of confession filed by the said Sokopo.

The defendants denied the debt, and said that the hearing fees, which were legally due and claimable in respect of the suit referred to in the summons, amounted to the sum of 1s. 8d. only by reason of the confession filed by the defendant in such suit, which amount of 1s. 8d. was duly paid by the defendants in this action.

The Civil Commissioner and Resident Magistrate of King William's Town and his Chief Clerk were called for the defence, and they stated that until the issue of the

Attorney-General's Circular, No. 6 of 1896, the hearing fees payable in an action for this amount after confession of judgment would have been 1s. 8d., and not 3s. 4d. as now claimed by the Government.

Judgment was given for the amount claimed in favour of the Government with costs.

The defendants now appealed.

Rule of Court 308, sub-section 2, provides: Amongst the fees to be taken in Magistrate's Court, "For every hearing 2d. in the £ upon the amount of the demand, but the fee in no case to exceed 3s. 4d."

Sub-section 3. "In all cases where the defendant shall either personally or by an attorney or agent confess judgment or admit the claim of the plaintiff in court, and in all cases by default where provisional judgment shall have been given upon any liquid document, the fee for hearing under clause 2 to be reduced one-half."

Sir H. Juta, Q.C., for the appellant: The object of the reduction is to induce confession of judgment so as to avoid a waste of time: but the logical inference of the Government contention is that if a defendant fights he can in no case be liable for more than 3s. 4d., but if he confesses judgment he may be liable for more.

Mr. Sheil, Q.C., for the respondent: The contention of the Government is that 3s. 4d. is payable. The reduction applied only to the fee for hearing, and that is 2d. in the £. The 3s. 4d. is not the hearing-fee. The fallacy in the appellant's argument is that he regards the 3s. 4d. referred to in section 2 as the basis on which half fees are to be calculated. It is submitted that the basis is still 2d. in the £ but where there has been a confession of judgment one half or 1d. in the £ is payable.

De Villiers, C.J.: In my opinion the appellants' contention is the correct one. In cases falling within the 3rd section the fee for hearing is to be one-half of the fees for hearing of cases falling within the 2nd section. The second section directs that for every hearing the fee is to be 2d. in the pound upon the amount of the demand, but the fee is in no case to exceed 3s. 4d. The respondent contends that the direction as to one half does not apply to this maximum fee of 3s. 4d., which he says should be read as incorporated in the 3rd section. Surely the more natural and reasonable construction is that the reduction should apply to the whole of the 2nd section and that therefore the maximum fee which can be charged under the 3rd section is 1s. 8d. To be logical the respondent should contend that there is to be no maximum under the 3rd section, but if there is to be a maximum it can only be one half of the maximum under the 2nd. section. The appeal must be allowed with costs.

Maasdorp and Solomon, J.J., concurred.

[Appellants' Attorneys, Messrs. Innes & Hutton; Respondent's Attorneys, Messrs. J. & H. Reid & Nephew.]

DAVIDS V. MENDELSOHN { 1898. Nov. 14th.

Lessor and lessee—Injury to tenant through repairs — Damages — *Volenti non fit injuria.*

The lessor of a house wishing to repair the roof of a house which was becoming dangerous gave due notice to the tenant to leave. The tenant refused to leave and while the repairs were being executed a portion of the roof fell in and injured the tenant.

Held, *that the tenant was not entitled to claim damages for the injury from the lessor.*

This was an appeal from the decision of the Resident Magistrate of Cape Town in an action for damages brought by the appellant against the respondent for injuries sustained by her through the collapse of the roof of a house in Buitengracht-street. The appellant alleged that she was living with one Abdol Davids to whom she was married in accordance with the rites and customs of the Mohammedan religion; that in the month of March, 1898, Abdol Davids was the tenant of the defendant at a certain house in Buitengracht-street at a monthly tenancy; that owing to the defendant having wrongfully and unlawfully commenced certain repairs to the said premises without having first obtained the permission of the Town Council of Cape Town, and having negligently carried out such repairs the roof of the house fell in and injured the plaintiff. She claimed £20 damages.

The defendant filed a special plea to the effect that the plaintiff had had due notice to quit the house in order that the repairs might be effected, that she neglected to quit, and that she remained on the premises at her own risk and peril, The evidence showed that two persons were killed and several injured by the same accident.

The defendant in his evidence said: "I repeatedly gave plaintiff and her husband notice to quit the place as I wanted the roof repaired. . . . "I gave the man Abdol Davids notice in January, 1898, to quit because I wanted to get rid of him. I gave the first notice in December, 1897, to the tenant in question to quit on February 1, 1898. On February 1, 1898, he told me he would clear out as soon as he could get rid of his tenants. I commenced to make arrangements in December, 1897, for the alterations to the roof. I again saw them the Saturday before the builders started, and I was told that the tenants would not leave. I said, 'You must all clear out, because the work commences the following Monday.'"

The Magistrate granted absolution from the instance with costs.

The plaintiff appealed.

Mr. Close for the appellant: We deny any formal notice to quit. The conduct of the respondent shows that he did not intend to turn the appellant out of the house altogether. Repairs were going to be executed, and no one believed that there was any danger. If it is found that there was a definite notice to quit then the question is to what extent is the doctrine of *volenti non fit injuria* to be carried? That doctrine does not justify the respondent's conduct.

[Solomon, J.: If it is a part of your case that there was no reason to apprehend danger how could there be negligence?].

The negligence consisted in not making a proper inspection of the woodwork and in not obtaining the authority of the Town Council for the alterations. Only that contributory negligence is a complete defence to an action for damages which is to a great extent the cause of the damage. The proximate cause of the damage is the test of liability *Butterfield* v. *Forrest* (11 East, p 60); *Davies* v. *Mann* (10 M. & W., p. 546). A risk cannot be taken unless it is known that the risk is there: that is implied by the maxim *Volenti non fit injuria*.

Mr. Graham, Q.C, for the respondent, was not called upon,

The appeal was dismissed with costs.

De Villiers, C.J.: There was clear evidence in the Court below that notice had been given by the defendant to the plaintiff that she was to leave the premises because they were about to be repaired. She knew the risk she was incurring by remaining in the house while the repairs were being executed, and she preferred the risk to the inconvenience of going elsewhere. The repairs were urgently required to make the roof safe, so that, if there was negligence on the part of the workmen who executed the repairs, there was no wilful wrong done by the defendant. Through the accidental falling of a portion of the roof the plaintiff was injured, but the injury was occasioned by her own fault in remaining on the premises with full knowledge of the danger and after being warned to go. If ever there was a case to which the maxim of the English law *Volenti non fit injuria* would apply this is one. That maxim is not taken *verbatim* from the Roman law, but the principle which underlies it was fully recognised. One of the rules of law, for instance, cited in the *Digest* (50, 17, 203) is that a person who sustains damage though his own fault is not deemed in law to have sustained any damage at all. The Magistrate in this case properly found for the defendant and the appeal must therefore be dismissed with costs.

Mr. Graham applied for the costs of the application by the respondent made on the 1st inst. for a discharge of the notice of appeal.

The Court decided that no order should be made.

[Appellant's Attorneys, Messrs. Innes and Hutton; Respondent's Attorney, D. Tennant.]

CAPLES V. RIEDEL.

1898.
Nov. 14th.

Slander—Defamatory words.

The following words "I saw him last night in my yard fiddling round a box of eggs" *are capable of meaning that the person of whom they were spoken was stealing, and are therefore defamatory.*

This was an appeal from a decision of the Acting Resident Magistrate of Kokstad, in an action heard by him on October 6 last. The action was for £50 damages, by reason of the defendant having in the presence of certain people uttered the following scandalous, malicious, and defamatory words in the English language: "I saw him last night in my yard fiddling round a box of eggs," from which it was to be understood that the defendant was accusing the plaintiff of stealing. A number of exceptions were taken to the summons, objecting that it was vague and embarrassing, and that the words were not defamatory nor did they bear the construction placed upon them.

The Acting Resident Magistrate overruled the exceptions, and the defendant appealed against his decision.

Mr. Graham, Q.C., for the appellant: There is no allegation that the plaintiff was a trespasser. The reasonable construction of the words is not one which bears out the innuendo that the act was a criminal one. The action was most trumpery.

Sir H. Juta, Q.C., for the respondent, was not called upon.

De Villiers, C.J. said: It is quite possible this may be a trumpery action, but it is quite possible also that it may not. That all depends upon circumstances, for these people may be very respectable people, the plaintiff may be a very respectable person, and he may, through the words uttered under the circumstances have sustained great injury. The only question that the Court now has to determine is as to what the words used were capable of the meaning attached to them in the summons. These words were: "I saw him (meaning plaintiff) last night in my yard fiddling round the box of eggs, from which the said witness understood that defendant was accusing the said plaintiff of stealing." The words used were quite capable of that meaning, and it was not necessary to specially name the act. It is sufficient if words were used from which that meaning may be reasonably derived. For these reasons I think the Magistrate right in dismissing the exceptions, and the appeal must be dismissed with costs.

Maasdorp and Solomon, J.J., concurred.

[Appellant's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

KRIEL V. KRIEL. { 1898. Nov. 14th.

Magistrate's Court—Summons—Act 20 of 1856, Schedule B, Rule 10—Magistrate's discretion.

In an action for trespass brought in a Magistrate's Court the summons alleged that the defendant had committed a breach of a particular clause in an award of arbitrators which had been made a Rule of Court; the clause referred to was inserted in the summons. An exception to the summons having been allowed by the Magistrate on the ground that a copy of the award had not been served upon the defendant in terms of Schedule B, Rule 10 of Act 20 of 1856,

Held, on appeal, *that the Magistrate had a wide discretion under that rule, and that as he had exercised it in a judicial manner, his decision should not be interfered with.*

This was an appeal from a decision of the Resident Magistrate of Montagu in an action in which the plaintiff sued the defendant for £20 damages for trespass. The action was founded upon a certain award by arbitrators made a rule of Court in July last. The summons set out that by virtue of a certain award of arbitrators in a suit in the Supreme Court which had been made a rule of Court it was adjudged *inter alia* that the defendant should not have the right to use certain water at certain times but that the plaintiff was entitled thereto, but that the defendant in breach of the said clause in the award had wrongfully turned off and used the said water. The defendant excepted to the summons on the ground that it was vague and embarrassing and bad in law, inasmuch as the award of the arbitrators, mentioned in the summons as being the document upon which the action was based, was not in evidence by service of copy thereof, whereas rule 10 of the Rules of Magistrates' Courts provided that any document upon which a complaint was founded should be served upon the defendant together with a copy of the summons. In the summons the clause of the award, upon which the complaint was based, was inserted and it was contended on behalf of the plaintiff that that was sufficient, the defendant being one of the parties to the award. The Magistrate allowed the exception, and against that decision the plaintiff now appealed. The Magistrate in his reasons for judgment said: It appears to me that the only question for the Court to decide is as to whether the defendant is prejudiced in his defence by the omission to serve a copy of the document. I am of opinion that he is. I fail to see how he is to prepare his defence without reference to the award, as the whole question of trespass depends upon the provisions therein set forth.

The plaintiff evidently presumed that as the defendant happens to be a party to the award he should have a copy of it or be conversant with its condition, but I do not consider such a presumption conclusive, and as a matter of fact the defendant's attorney in taking the exception stated that he had not seen a copy of the original document, nor had his client. No evidence was led on this point, as it appeared to me that on the face of the summons the exception must prove fatal, and the case be dismissed in terms of the rule.

Mr. Graham, Q.C., for the appellant The only question is whether the defendant could be prejudiced. Act 20 of 1856, section (*b*), Rule 10.

Mr. Currey for the respondent: The defendant had not had time to see the award. This action was brought only six weeks after the award had been made a rule of Court.

Mr. Graham in reply.

De Villiers, C.J.: The concluding portion of the tenth rule of Court provides that: "No case shall be dismissed for or on account of the omission to deliver a copy of any such document, account, or bill as aforesaid, in case it shall appear to the Court that such omission does not in effect and in truth prejudice the defendant in respect of his defence.' Now, the Court here referred to is the Court of first instance, the Magistrate's Court. In deciding upon such questions the Magistrate had a wide discretion. No doubt, he must exercise that discretion judicially The only question is, did he exercise judicial discretion or not? I am not prepared to say that he did not. He considered the whole question, and he came to the conclusion that under all the circumstances the defendant would be prejudiced by the omission. A portion of this award was set out, but not the whole and the Magistrate came to the conclusion that the absence of the whole of the award prevented the defendant from setting up such defence as he might otherwise have done. It is quite possible that it was necessary, for the purpose of filing a plea for instance, that the defendant should have the whole award before him. The Magistrate has, to my mind, exercised a judicial discretion, although perhaps just on the borderland, and I am not prepared to uphold the appeal, the more especially when it is remembered that the plaintiff could have saved expenses by withdrawing the summons and issuing a fresh one with a copy of this award attached. The appeal must therefore be dismissed, with costs.

Maasdorp and Solomon, J.J., concurred.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Sauer & Standen.]

SUPREME COURT

[Before the Right Hon. SIR J. H. DE VILLIERS, (Chief Justice), the Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

STIGLINGH V. RHODES. { 1898. Nov. 14th.

Sir Henry Juta, Q.C. (with whom was Mr. McGregor), appeared for the plaintiff.

Mr. Graham, Q.C. (with whom were Mr. Innes, Q.C., and Mr. Sampson, Q.C.) appeared for the defendant.

Sir Henry Juta said that in this matter his learned friend and himself had agreed that the plea to which exception was taken should be withdrawn, and that another plea should be filed. In that new plea the defendant admitted the allegations contained in paragraphs 1 and 2. He also admitted that at the time and place and under the circumstances referred to in paragraph 3 of the declaration, the words complained of and contained in the said paragraph, or words of similar purport were used. He denied the other allegations in the said paragraph, but did not deny that the words used by him were actionable, and admitted that he meant to convey that the plaintiff was supplied with money by the South African Republic with a view to promoting his election. These words were, however, spoken by him *bona fide* and without express malice. He submitted himself to the Court in regard to any damages which the plaintiff might prove he had sustained. Sir Henry Juta concluded by saying that the sole issue between the parties now was as to what damages the plaintiff had suffered.

Mr. Graham said that the real difference between the amended plea and the one now withdrawn was that the defendant withdrew the plea of justification. That had been done after consultation with his learned friends who appeared with him in the case and their client, and they had come to the conclusion that they had not sufficient legal evidence to entitle them to put before the Court a plea of justification. Consequently they had withdrawn that.

The Court allowed the amendment of the plea, the defendant to pay the costs.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

Contract—Claim for recission on the ground of misrepresentation.

ROBINSON V. RYVES. { 1898. Nov. 15th.

This was an action brought by Miss Laura Augusta Robinson, of Rosebank, against Miss Kate Lizzie Ryves, of Sea Point, for the recovery of a sum of £450, balance of an amount due on a certain contract.

The declaration alleged that in August, 1898, the plaintiff was proprietress of a girls' school at Sea Point, called All Saints' School, which was carried on in premises hired by the plaintiff from the owner. In that month she sold to defendant, and the defendant purchased from her all the school furniture, apparatus, household furniture, and goodwill connected with the school for £500, to be paid on the date of taking over the school. On October 1 last, the defendant took over the school, and was now carrying it on for her own benefit. She had paid £50, but had refused to pay the balance of £450 claimed.

In her plea the defendant admitted the contract of sale, and that she had taken over the school, but said that she was induced to make the contract by the fraudulent representations of the plaintiff. Defendant alleged that the plaintiff gave her to understand that there was no opposition school nearer than Cape Town, that plaintiff had overstated the income, exaggerated the number of scholars, misrepresented the respective number of boarders and day scholars, and wilfully exaggerated the value of the furniture. She denied that she had taken the lease, and stated that she would not have entered into the contract but for the fraudulent misrepresentations of the plaintiff. She was willing to give up the possession of the furniture and the property if she received back her £50. She claimed in reconvention a rescission of the contract and also £250, as damages sustained by her in having been induced to come to the Colony by these fraudulent misrepresentations.

Mr. Searle, Q.C. (with whom was Mr. Upington), for the plaintiff.

Mr. Graham, Q.C. (with whom was Mr. Currey), for the defendant.

Mr. Graham having admitted that the onus of proof lay on the defendant.

Kate Lizzie Ryves, the defendant, deposed that when she was in England she entered into negotiations, in the first instance through a scholastic agency at Home, with plaintiff for the purchase of the goodwill and furniture of All Saints' School, Sea Point. (Counsel read the correspondence which had passed on the matter.) When she arrived here she discovered that, contrary to what she had been led to believe by the correspondence, there was serious competition to the school, one school in particular, the Government-aided school at Sea Point, having about 140 pupils, and giving a better education than All Saints. That was a formidable competitor. Plaintiff had stated that there were sixty-six pupils, nine boarders and fifty-seven day scholars, but witness could only trace from the books fifty-seven scholars altogether, only six of whom were boarders. The receipts, as shown by plaintiff's fee-book, were less than were represented by plaintiff, who had also represented that the yearly income was £1,600, but witness could only trace from £1,200 to £1,400. After detailing the discrepancies, witness said that the school was now being carried on at a loss of £800 a year, and it was not possible to make any profit out of it. With regard to the furniture, that was old and shabby, and the pianos were very bad. Defendant also found that plaintiff had not a yearly lease, but was a monthly tenant, and she had herself to arrange for a lease. If she had known the true position of affairs with regard to the competition alone she would never have come to the Colony.

Cross-examined: Plaintiff had informed her that the Public School at Sea Point was equivalent to a Board school of the higher grade in England. Defendant did not make a point of the furniture. A Board school in England was a free school, and attended almost solely by children of artisans.

Dr. Muir, Superintendent - General of Education, said there was a Government-aided girls' school at Sea Point, which received a grant as a first-class school. It was intended that it should give education exactly similar to that given by other first-class schools elsewhere, such as the Good Hope Seminary and the Wynberg High School. It was intended that the same class of education should be given as in the High Schools in England. In England the Board schools gave free education, and were frequented mainly by the children of the people of the artisan class. A Cape third-class, or even second-class, school would correspond to the Board schools in England. The High Schools in England were not as a rule supported by Government. Witness was of opinion that the Public School at Sea Point would be a formidable competitor to All Saints' School. He detailed how the former school had come to be established, and said it had arisen very rapidly.

Cross-examined: The school was established on January 1 last.

John Alfred Ellis stated that he was secretary and treasurer and co-manager of the Girls' Public School at Sea Point. In January last they had ninety-four pupils on the roll. They now had 150. It was their intention to give the girls as good an education as was given at All Saints. They were going in for considerable building operations. As to the establishment of the school, there had been public discussion, and the matter was in the newspapers, and circulars had been sent out.

John Klerck, in the employ of Messrs. Lindenberg & De Villiers, said that he had had considerable experience in valuing furniture. He valued the furniture, pianos, books, &c., at All Saints at £313 15s. 9d.

Cross-examined: He did not value the goods from a list. He went personally over the house. He valued the pianos from £10 up to £30 each.

This closed the defendant's case.

Laura Augusta Robinson, the plaintiff, stated she now lived at Rosebank, and formerly carried on All Saints' School at Sea Point. When she mentioned a public school in her negotiations with Miss Ryves she referred to the Green and Sea Point Public School. She never thought of that school entering into competition with All Saints. She had never lost a pupil to it to her knowledge. Witness considered the school of a different class to hers. When she described it as a Board school of the high class, she wanted to convey that it was something different to the High schools at Home. She knew of what were known as Board schools of a higher grade at Home, and she meant that it was something like those. She denied that she overestimated the number of pupils. Witness did all in her power to make the school a success under Miss Ryves. She offered to stay for a time with defendant, but the latter did not see the necessity for her doing so. At a meeting at Mr. Buissinne's the defendant, after an arrangement had been come to as to some cleaning, agreed to sign the agreement, saying she would do so at Sea Point, and send it with the cheque to Mr. Buissinne. The first time she heard her objection on the ground of the competition was October 12 or 13.

Cross-examined: In teaching the question of competition was a serious one. When she wrote on July 19 she had eleven boarders on her list. She handed over three to Miss Ryves. When she wrote on July 19 she had also forty-six day scholars. She handed over thirty-six to Miss Ryves. There was no question but that the witness's staff at All Saints' School was superior to that at the public school. Witness had never received the circulars sent out with regard to the public school. Witness was perfectly amazed when, within the last few weeks, she heard there were such a large number of girls attending the public school. Witness first made up her mind to dispose of her school about the beginning of the year. There was then no sign of falling off.

Re-examined: She had done everything she could for Miss Ryves. To her knowledge, she had concealed nothing with regard to her school.

Louis Joseph Cauvin, sworn appraiser, said that he had valued the furniture, &c., in the school. He had a list, and went carefully through the house. He valued the goods in the establishment at £504, as a going concern.

Cross-examined: If they were carted away and sold by public auction the goods would not fetch that. He would not give that for them. At public auction they would fetch about 15 per cent. less. He valued the pianos from £10 to £35 each.

Walter Rose. auctioneer and valuator, said he had valued the goods at £506 1s. 3d. In some cases the valuation differed, but the total was about the same.

By the Court: He and Mr. Cauvin were both at the valuation.

Cross examined: Their object was to arrive as nearly as possible at the same result.

Re-examined: They knew nothing about the £500, and did not go out with that idea.

Emma Martin stated that she had been the vice-principal of Miss Robinson's school for ten years, both at Wynberg and Sea Point. About the beginning of the year, witness, for family reasons, decided to return to England. At that time there were no signs of falling off in the school. On Miss Ryves's arrival, she made complaints as to the condition of some of the rooms. She also told witness that she would be content if she only lost twenty pupils. She corroborated plaintiff as to the first meeting at Mr. Buissinné's office, when the questions of cleaning and the lease were discussed. Witness did not consider the Sea Point Public Girls' School a rival to All Saints. As far as they knew they never lost a pupil to that school. She doubted if the Green Point Public School was quite as good as the higher grade Board schools in England. Pupils had passed the matriculation from All Saints' School.

Cross-examined: She could not tell how many pupils had passed the matriculation from All Saints during the past three years. Last year they lost a good many pupils through people going Home. She was of opinion that the school was now as flourishing as it had ever been.

William Templar Buissinné, the plaintiff's attorney, deposed that plaintiff and defendant came to his office on October 1. Witness had already drawn up the agreement. There was a discussion as to the cleaning of the rooms and as to the lease of the school. Defendant said she was willing to enter into a lease of the school at £25 a month. After she left witness arranged for the lease. On October 4, at another interview he had with plaintiff and defendant, the latter agreed to sign the agreement when the rooms were properly cleaned. She told witness she would sign the agreement at Sea Point, and send it to him.

After hearing Mr. Graham, and without calling on Mr. Searle.

De Villiers, C.J., said: The defendant admits the purchase of the goodwill of the school and the furniture for the sum of £500, but says she was induced to make that purchase by the wrongful, unlawful, and fraudulent misrepresentations of the plaintiff. These alleged fraudulent misrepresentations consisted of the following: First, the plaintiff alleged there was no opposition school nearer than Cape Town; second, the plaintiff largely over-stated the income she was receiving from the said school; third, the plaintiff exaggerated the number of pupils attending the said school, and misrepresented the number of boarders and day scholars respectively; fourth, the plaintiff wilfully exaggerated the value of the furniture in the said school. I may say at once that whether there was misrepresentation or not I am quite satisfied there was no wilful or fraudulent misrepresentation on the part of the plaintiff. It is impossible to conceive any motive for her making any fraudulent misrepresentation of the kind. The price given for the goodwill and the furniture was certainly not excessive; according to some witnesses the furniture could not have been bought for less than £500. At a public sale the plaintiff would probably not receive £500, but it was probable she would not receive much less. Therefore there was no motive to induce the plaintiff to make a fraudulent statement. Then the question was asked the plaintiff: "If the furniture was worth £500, why were you so anxious to sell the goodwill and furniture?" The plaintiff's answer to that was quite satisfactory. In the first place she said she was anxious to avoid a public sale of the furniture, and in the second place she was anxious that the school, whose reputation had been built up by her, should be carried on. That was an honourable motive. In order, therefore, to have the school maintained when she gave it up, she answered an advertisement she saw in an English newspaper, and in that way entered into communication with the defendant, who purchased the school. Then the next question we come to is whether there was any such material misrepresentation made as would have induced the plaintiff to make this purchase, and without which she would not have done so. Applying even that test I am satisfied that there was no such material misrepresentation as to justify the defendant in repudiating the contract. There was the alleged misrepresentation in plaintiff having stated that there was no opposition school nearer than Cape Town. Now that does not fairly represent what was stated, for if it were taken together with the correspondence it would read that there was no school of that particular class, such as was being conducted by the plaintiff, that would enter into competition. The plaintiff admitted in the correspondence that there was a school within two miles, which, however, was equivalent to a Board school of the higher grade. It is said, however, that a Board school of the higher grade in England would admit a class of people very different from what the public school at Sea Point would admit. That may be true up to a certain point, but we must ask ourselves what the plaintiff meant to be understood by that statement. Well, her sole object was to give an equivalent existing in England to the school established at Sea Point, and the nearest equivalent was a Board school of the higher grade. Now I take it the object of persons sending their children to a school like that of plaintiff's would no doubt to some extent be to have a select school to which everybody who wished could not be admitted; a school in which the fees would be higher, and in which there would be a higher class of pupils, and certainly the plaintiff's school fairly represented that class of school. It is an old-established school here now, well known, and has always been known to be a private school where the fees charged were higher, and a school in which the plaintiff had a control which she was entitled to exercise in the admission of pupils. That is the theory on which people send their children to such schools instead of to a public school, whether called a Board school of the higher grade, as in England, or such a one as that established at Sea Point. Therefore, I think there is no such material misrepresentation as to justify the defendant in setting aside the contract. The next question was as to whether the plaintiff had overstated the income of the school. Now, there is no doubt that the income varied from year to year, even from term to term, but if we take the last four years I think £2400 fairly represents the average yearly income. In 1896, and also in 1897, the income varied from time to time, but there is no reason for believing that at the time the plaintiff entered into this contract there was such a fall in the fees as to lead to the belief that the school was going back. My remarks equally apply to the statement that the plaintiff exaggerated the number of her pupils or that she misrepresented the number of boarders and day scholars respectively. I think that in the correspondence she fairly stated the condition of her school at that time. She seems to me to have been at great trouble to furnish the most accurate information to the defendant that she possibly could. With regard to the alleged wilful exaggeration of the value of the furniture, even the defendant's own valuator values the furniture at over £300, while the plaintiff's valuators value it at over £500, so that if she purchased this furniture, good will, &c., all for £500 there is clearly no such exaggeration as is relied upon. For these reasons I am of opinion that the plaintiff is entitled to succeed in this action, and that the defendant must fail in her claim in reconvention. Judgment will therefore be for the plaintiff with costs.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

PRINS V. DIRK.

1898.
Nov. 15th
„ 17th.

This was an action for a declaration of rights. The plaintiff and the defendant were owners and occupiers of certain pieces of quitrent ground at Blaauwberg, and the plaintiff alleged in his declaration that the defendant had encroached upon his ground by allowing his cattle to trespass thereon, and had also cultivated and was growing crops upon a certain piece of ground on the westward of an outspan within the boundaries of plaintiff's land. Plaintiff further claimed the right, according to his grant, to water his stock at a certain spring on defendant's land, which right the defendant had interfered with. He further alleged that by the defendant's action he had sustained damages to the extent of £100. He therefore prayed that the line J K A shown on the plan annexed to the declaration be declared to be the boundary between the respective lots of the parties; that the defendant be restrained from cultivating the ground within plaintiff's boundary and that he be restrained from grazing his stock thereon; also for a declaration of his right to use the spring; and further that the defendant pay to the plaintiff £100 as and for damages sustained, with costs of suit, or other relief.

Mr. Buchanan appeared for the plaintiff; the defendant was in default.

The following evidence was led:

Cecil Robert Saunders, clerk in the Surveyor-General's Office, produced the certified copy of the grant of land to the defendant.

Jurie J. M. Prins, the plaintiff, deposed that his lot and defendant's adjoined one another. Witness's boundary line was that marked J K A on the plan. The defendant had cultivated land on the outspan on plaintiff's side, distinctly within the line mentioned. He had cultivated about three morgen on witness's ground. Defendant's cattle had also trespassed on witness's farm, although witness had driven the cattle off, and warned defendant not to allow them to trespass. When witness remonstrated with him, he said he had the right to sow on that part of the outspan, on condition that he allowed travellers to graze on his ground. Witness had the right, according to the grant, to water his stock at the spring on defendant's land, but defendant had refused to allow the sheep and goats to be watered there. When witness found defendant was still trespassing he issued summons in the case, and had the lot surveyed by Mr. Theal, who placed flags along the line of the boundary. Those flags passed through the land cultivated by defendant. Since then, as late as November 13, the cattle had trespassed again. Witness ad suffered damage to the extent of £100.

William Theal, Government land surveyor, gave evidence as to his having been engaged by the plaintiff in June or July last to survey his farm. He made a survey of the farm, and also of defendant's, so far as was necessary, and his plan, which was annexed to the declaration, was correct. The defendant had cultivated a portion of the land, which fell within plaintiff's boundary line.

The Court made a declaration of rights, as claimed by plaintiff, and awarded him £25 damages with costs; plaintiff to receive his costs as a witness, and defendant also to pay the cost of the survey made by Mr. Theal.

[Plaintiff's Attorney, H. P. du Preez.]

[Before the Hons. Mr. Justice **MAASDORP** and Mr. Justice **SOLOMON**.]

ROSS V. ROSS. { 1898. Nov. 16th.

This was an action brought by Clara Mary Ross against her husband, William John Ross, for a decree of restitution of conjugal rights, failing which for a decree of divorce, with forfeiture of the benefits under an ante-nuptial contract. Plaintiff also asked for the custody of the children of the marriage.

Mr. Currey appeared for the plaintiff.

The defendant was in default.

Francis Henry le Sueur, clerk in the Colonial Office, in charge of the marriage register, certified to the copy of the marriage register of the parties produced.

Clara Mary Ross, the plaintiff, said that her maiden name was Dieperink. She was married to defendant, William John Ross, on June 29, 1889. Previous to the marriage an ante-nuptial contract was drawn up. There were three children of the marriage, a girl aged eight years and two boys aged seven years and five years respectively. During the past five years their married life had been an unhappy one, on account of her husband drinking. In February, 1896, witness paid a visit to her sister in the Free State, and after being there for a few weeks she accompanied her sister to Johannesburg. She returned to her mother's house at Sea Point in October of that year. Her husband came and stayed for a few days, but left after that time. In September or October last defendant said he was going to leave her, and not work any more. He said he had worked enough. He had deserted her. They had not cohabited for the last five years, and during the last three years he had contributed nothing to her support. He was now staying at the Salvation Army Social Farm at Rondebosch.

By the Court: Witness desired, in the event of defendant not returning to her, to have the custody of the children of the marriage.

The Court granted an order calling on the defendant to return to or receive the plaintiff on or before December 15 next, failing which, to show cause, on January 12 next why a decree of divorce should not be granted, why the plaintiff should not have the custody of the children of the marriage, why he should not be declared to have forfeited the benefits of the ante-nuptial contract, and why he should not pay the costs of the suit.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

MAHOMED V. TALIEP. { 1898. Nov. 16th. " 17th. " 19th.

Party-wall—Building—Condition—Breach.

The plaintiff consented to the defendant building on his half of a common wall between their respective properties, on condition that the top of the wall should be left "free for still further building if hereafter found necessary." The defendant after completing the wall, and without the plaintiff's knowledge, placed upon the top of it a guttering and a parapet, each covering one-half of the wall.

Held, *that the plaintiff, upon discovery of these constructions, was entitled to an order for their removal, and the completion of the wall in accordance with the condition.*

This was an action to compel the defendant to effect certain alterations in a party wall and for damages.

The plaintiff's declaration was as follows:

1. The plaintiff resides at Newlands; the defendant resides in Cape Town.

2. The plaintiff is the registered owner of certain property in Vredenberg Steeg, off Long-street, with the buildings thereon; and the defendant is the owner of certain land and buildings immediately adjoining those of the plaintiff.

3. A certain wall upon the south-eastern boundary of the plaintiff's land separates his building from the buildings of the defendant, and is a party wall common to the owners of the two properties.

4. In or about the month of May, 1896, the defendant wrongfully began to build upon the said party wall with the view of raising the height of his house, and for other purposes.

5. The plaintiff objected to the said action of the defendant, as he had a right to do, but, after certain negotiations between the parties, it was agreed by them that the plaintiff should allow the defendant to proceed with his work and utilise the said party wall upon the following conditions:

(*a*) That any addition in the height of the said party wall should be throughout of the same width with it, and should also become and remain common to the two properties.

(*b*) That the plaintiff and his successors in title should have the right at any time to build on to the said common or party wall and its continuation, and should be entitled to insert such beams or supports therein as might be necessary for the above purpose.

(*c*) That the defendant should not support any water tank upon the common wall, and should lead the rain water coming from the roof of his building away from the said wall by means of guttering discharging into his own yard, and should leave the top of the said wall free to be further built upon thereafter, should the plaintiff find it necessary.

(*d*) That a certain chimney which the defendant had then commenced to build into the said party wall should be removed.

The defendant accepted the said conditions, and agreed to give effect to them in carrying out his proposed work, in consideration of the plaintiff's withdrawing his said objections.

6. The defendant then proceeded with his said work and built upon the said party wall, but he did not observe all the conditions agreed upon by him as aforesaid. In particular,

(*e*) He wrongfully built a chimney into the said party wall.

(*f*) The continuation in height of the said party wall was not made of the same width as the original wall, and at the top it was only half the said width.

(*g*) The top of the said wall when heightened was not left free and open as provided, but upon half the width of it the defendant had placed guttering and spouting, so that it has become impossible for the said wall to be built upon hereafter by the plaintiff, should he so desire.

7. The defendant concealed the said breaches of his agreement from the plaintiff's notice while the said work was being executed by building up the wall in such a way upon the plaintiff's side that the

matters in the preceding paragraph set forth could not be seen or detected by any person standing upon the plaintiff's property.

8. The defendant represented to the plaintiff that he had duly carried out all the conditions upon which he had been allowed to proceed with his work as aforesaid. And the plaintiff did not consider that he had not done so, and was not aware of the facts set forth in section 6 hereof until the month of March, 1898.

9. If the said chimney is allowed to remain in the said party wall, and if the said wall is not built up of uniform width throughout its entire height, and if the guttering upon the top of it is not removed, and the wall allowed to remain free for building upon. the plaintiff will suffer considerable loss and damage, to wit, in the sum of £250 and upwards.

Wherefore the plaintiff claims:

(*a*) An order compelling the defendant forthwith to remove the said chimney and the said guttering, and to build up the said party wall to its full width as aforesaid.

(*b*) Payment of the sum of £250 as damages.

(*c*) Alternative relief.

(*d*) Costs of suit.

The defendant pleaded as follows:

1. He admitted paragraphs 1, 2, and 3 of the declaration.

2. He admitted that after he began building the wall the plaintiff objected thereto, and proposed conditions which were acquiesced in by him, and that he then proceeded with the work, save that there was no mention in those conditions of any chimney, and save as hereinafter set forth.

3. He said that after the conditions had been agreed to after he had rebuilt the wall of the same width as the party wall he and the plaintiff personally met on the defendant's building, and discussed the matter of the erection of the wall, and then and there agreed as to the wall and the manner of its utilisation, the chimney, and the guttering and spouting.

4. He said that he agreed to remove the chimney he had built, and to substitute one built in a manner indicated by the plaintiff, and then and there mutually agreed on, to wit, that it should only extend over nine inches of the party wall, so as to have nine inches from the side of the plaintiff's property; and the plaintiff approved of and acquiesced in the guttering and spouting' and the width of the wall, and everything about it built.

5. The chimney was thereupon reconstructed and the wall completed in the manner approved of by the plaintiff.

6. He denied that the wall was not of the proper width at the top, and said that half of it was free for the plaintiff to build upon.

7. Subject to the above he denied paragraphs 7, 8, and 9, and said that the plaintiff was frequently on the defendant's building while the building operations were in progress, and was fully cognisant of them.

8. He admitted that the wall was a party wall, but denied that the erection was wrongful or that the defendant had suffered any damage at his hands.

The replication was general.

Mr. Searle, Q.C. and Mr. Benjamin appeared for the plaintiff.

Mr. McGregor and Mr. Close for the defendant.

Hadje Mahommed, the plaintiff, stated that up to nine months ago he lived in Bree-street. He owned considerable property in Cape Town. In Vredenburg-lane, which ran off Long-street, he owned eleven houses. The defendant Imaum Taliep owned property adjoining that of witness. About the end of May, 1896, witness observed that defendant was building on his property, and had commenced to build upon the common wall. He had then built from three to five feet on this wall. The party wall was about twenty-one inches wide, and the wall defendant was building was fourteen inches thick. Witness remonstrated with defendant, but the latter said he had a right to build on the wall. Afterwards witness's solicitors wrote to the defendant on the matter. On June 16, when the work was nearly done, witness again saw the building. It was then nearly completed and witness found the chimney came quite out to his side. Another letter was sent by witness's solicitors and the chimney was removed. but about the end of March this year witness found out it had not been removed to the right place. It was not possible to see that properly from witness's yard. Witness had not seen defendant on this matter from the time he mentioned about the end of May, 1896, until this year. After he discovered that the chimney was not in the right place, he went there on April 1 of this year with Mr. Kayser and saw defendant, who said the wall was all right, but witness and Mr. Kayser made a closer examination, and found that the wall was not built in accordance with the agreement arrived at. Witness's conditions were that the wall should be kept free, and that there should be no guttering or chimney on it. That was what he wanted. He afterwards met defendant at Mr. Kayser's office about April 5, 1898. An agreement was then being drawn up. Witness was willing to allow matters to remain as they were, so long as his rights were protected, and he had a free wall to build on whenever he wanted. The next day a letter was received saying that defendant did not see the necessity of any such agreement. If this chimney, guttering, &c., were not removed witness would suffer damage, for if he were to raise his building he could not use the common wall, and would have to build a wall on his own property. He would rather have the wall made according to the conditions than the £250.

Cross-examined: Witness never asked Imaum Taliep to sell his house to him. He was never on Taliep's roof in 1896. Imaum Taliep had never told witness to order the masons to remove the chimney to such place as he wanted. Witness did not talk to Aboukir about the beginning of this year about defendant wanting to execute a notarial agreement. Witness could not tell the position of defendant's chimney before he commenced the building. Witness had thirty-four houses and could not bother about everything.

By the Court: He did not believe the chimney ran into the party wall.

Maasdorp, J.: Then your own plans are wrong.

Further questioned by the Court, witness said it might run a little into the wall.

John Parker, architect, gave evidence as to the present condition of the party wall. The old wall was what was called an 18-inch wall; that was about 20 inches with plaster. The new wall which had been built was also an 18-inch wall until about 18 inches from the top, and then there was a set-off on the plaintiff's side. A lead box-guttering had then been made against the 9-inch parapet. That guttering was the same width as the half of the wall. It was impossible to see from the plaintiff's premises the condition of things with regard to that wall. To do so a person would need to go up as high as defendant's roof. If the plaintiff wished to build higher and continue the same width of the roof the box-guttering would have to be removed. Plaintiff could build a 9-inch wall. He could not by the regulations be allowed to go more than a few feet higher with a 9-inch wall. It would cost about £12 10s. to make the 9-inch parapet now existing into a solid 18-inch wall. To reconstruct the box-gutter would cost about £7. To build a 9-inch wall from plaintiff's ground would cost £55; an 18-inch wall about £100.

Cross-examined: The buildings there were not high-class buildings. To have the guttering over the room would be perfectly usual. Witness did not think the old party wall was strong enough to carry a high building. He saw no objection to the position of defendant's chimney in the wall, except that it would have to be carried up if the plaintiff decided to raise the height of his building.

R. H. Morris, a builder, said he agreed that the plaintiff could not tell the position of the gutter. To remove the gutter and build up wall properly would cost £29 18s., to remove the chimney and put it on defendant's ground £55. He would not recommend the building an additional 9-inch wall on plaintiff's own property.

J. B. Kayser, an attorney acting for plaintiff, gave evidence as to correspondence between the parties. He saw the defendant at his house and asked him how it was he had not carried out the arrangement, and defendant said he had. Plaintiff asked defendant leave to go up; then they discussed the gutter. Witness believed defendant to mean that he had built in accordance with the terms of the letter; he did not set up a subsequent arrangement.

Imaum Hadje Mahomed Taliep, the defendant, said the chimney was in the same place as the old chimney was; he began building; plaintiff came when it was 8 or 9 feet high, and said he did not want 14 inches, he wanted 18 inches. Defendant received a letter from Kayser and went to see the latter, and agreed to break it down and build 18 inches, after that he got another letter. He went on again with 18-inch wall below; they built the wall 11 feet high; the chimney was 4½ beyond the middle. Plaintiff got on the top and said he did not want the chimney there; he said I should not go beyond the half, that was about the end of June. Plaintiff told him to go to Kayser, and Kayser said he was to break down the chimney and put it back. Next day plaintiff came into the yard. Mr. Russell was there. Defendant told plaintiff to tell the masons what to do; he said 9 inches must be left free; he said the gutter was good and need not be broken down. The parapet was finished, and plaintiff said nothing about that. Plaintiff stood by while the chimney was broken down and built up. Two or three days afterwards plaintiff came again and said it was all right. In April last plaintiff offered to buy his house for £800. He wanted defendant to consent to break down the chimney when required.

Hadje Aboubak, who assisted to build the wall, gave further evidence in support of defendant's case.

Edward Simpkin, architect, deposed that he drew up the plan produced. It was correct. The guttering in question was a sound one, and capable of carrying away the water. If plaintiff wished to build he could go 9 feet higher than defendant's house by carrying up a 9-inch wall. That would allow another story. Plaintiff would, according to the Municipal regulations, have to use red hard brick if he did so.

Cross-examined: The character of the guttering would have to be altered in order to make an 18-inch wall.

Two brothers of the defendant and a Malay mason, who were engaged on the building in question, gave evidence in support of the defendant's contention that the plaintiff had, during the progress of the work, expressed himself satisfied with the alterations made in consequence of the objections he had brought forward.

Abdol Kadi, cigar manufacturer and sworn translator, gave similar evidence.

James Russell said that in 1896 he was building inspector to the Town Council of Cape Town, and in that capacity visited the building in question. The building was finishing on July 7, 1896, and the certificate of completion was given on September 16 of that year. He was on the roof one day in June, when they were pulling down the chimney, and in reply to witness the defendant stated that he was pulling down the chimney to please plaintiff, as he had encroached on his half of the wall. Defendant further said that he placed the matter in the plaintiff's hand so that he could get done what he wanted. Witness made several suggestions, to which plaintiff agreed, and the work was carried out. The guttering was satisfactory.

Mr. Searle: The common law rights of the parties were discussed in *Pike* v. *Hamilton Ross & Co.* (2 Searle, p. 191; per De Villiers, C.J., at p. 196). Each party is entitled to use one-half only. Then the contract containing the conditions set out in the declaration appears to be clear. As to the fresh agreement alleged to have been entered into by the parties, there is no consideration for that set out; there is also a conflict as to what its terms were.

Mr. McGregor: Defendant has not infringed the condition that the top of the wall should be left free for building if thereafter necessary. The intention of the parties was that the plaintiff should still keep his common law right of building on the one-half, although the solid wall had been built by the plaintiff. If there is any ambiguity it should be construed against the stipulator.

Maasdorp, J., said: It appears that there was a common wall, 18 inches thick, in existence between the properties of the plaintiff and defendant. In 1896 the defendant commenced building upon that wall. Well, as to the rights of the parties before the defendant commenced to build, it seems to me that each would have had the right to build upon one half of the wall, but as the defendant did not consider that sufficient, he extended his operations further, and built to the extent of 14 inches upon that 18-inch wall. In doing so he went beyond his rights, and consequently the plaintiff complained, but added that he would consent to the defendant building upon that party wall if he observed certain conditions. Fortunately for the Court, in this case the conditions were put in writing, and they are now admitted to be the conditions upon which the defendant afterwards proceeded with the building. Among these conditions we have the following: "That the defendant make the wall the full width of 18 inches; that our client (the plaintiff) or his successors in title shall be at liberty at any time to build on this common wall, and insert such beams or supports therein as may be required, and that the defendant shall leave the top of the wall free for still further building, if hereafter found necessary." First, as to the construction of that agreement; at the time it was entered into, I may say that it seems to me it was intended by the parties that a wall of the thickness of 18 inches should be built up by the defendant, and that when it was completed the top should be of the width of 18 inches, and should be left free of obstruction. That that was intended also appears from the circumstances of this case. It was evidently found by defendant that a 9-inch wall would not be sufficient for his purpose, and that was clearly in the minds of these parties all through these operations. He did not wish to be reduced to making use of the 9-inch wall, but wished to have the right to make use of the whole of that 18-inch wall. It was therefore the duty of the defendant, after he had completed building to leave the top of the wall to a thickness of 18 inches free from all obstructions. He went on with his building, but was afterwards discovered to have placed upon the top of this wall a guttering and parapet, the one covering half of the wall and the other the other half. The plaintiff says that he only made that discovery lately, and that upon doing so he proceeded to the office of his attorney and nformed him of it, whereupon he and the attorney went to the defendant's house and had an interview with him. At the interview Mr. Kayser (the attorney) asked the defendant whether he had left the roof free as agreed upon, and the latter thereupon stated that he had done so. Whether the defendant believed what he said was true, or whether he intended to deceive Mr. Kayser, is not quite clear, but when Mr. Kayser went on to the roof he found that the wall had not been left free as had been agreed upon in the contract. It was said for the defendant that this was discovered by the plaintiff immediately after the building was completed, and that he should have raised his objections at that time if it was a breach of the agreement, and that through his not having done so he has lost his right to complain. If the plaintiff had actually seen the parapet being built and the guttering laid down then it might have been said that he was estopped from complaining about what he himself saw was being done. But his position was different, because he only saw the trespass after it was completed, and the evidence as to what he precisely said when he did so discover that is not quite clear. We may safely take the evidence of Mr. Russell, but then that only amounted to this : that the plaintiff raised no formal objection to the guttering being placed there, for Mr. Russell does not say that he used any words of consent. It is contended that by the plaintiff occupying that position at that time he lost his right thereafter of demanding that the guttering should be withdrawn. I must say that there has been no authority quoted for that. If a man sees his property has been trespassed upon, but allows it to continue for some time, it does not follow that he allows the trespasser to acquire a right. That being so, the plaintiff is now entitled to come to court and ask that the contract be observed, which amounts to this, that the defendant should leave the wall when completed a thickness of 18 inches, and free for building purposes. The building purposes contemplated by the parties were for their mutual benefit. It seems to have been agreed that either the defendant or the plaintiff would have the right hereafter to build upon the full wall whenever they felt inclined to extend their buildings. That right is a common right possessed by both parties, and the plaintiff claims that the defendant should not be allowed to do anything which would prevent him at any future time from carrying out that right. There was some other claim made by the plaintiff with respect to the chimney, but that has been withdrawn, and nothing further need be said with regard to that. The Court will therefore give an order in the following terms: That the defendant be ordered to remove the parapet wall and the guttering from the top of the common wall, and that that wall when finished be of the full thickness of eighteen inches, and that its top be left free of all obstructions. With reference to the claim for damages, that seemed only to be in the alternative in case the defendant was not ordered to remove those obstructions, but an order to that effect having been granted there is now no claim for damages. I may say that some time will have to be fixed within which these obstructions are to be removed. A reasonable time will be given, and there seems to be some hope that in that time the parties may come to some understanding that will obviate the necessity for the removal, but will leave the rights of the parties so that in the future there will be no chance of a plea of prescription being set up. The date the Court will fix for the removal ordered will therefore be December 20. The defendant will pay the costs of this action.

Solomon, J., concurred.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné ; Defendant's Attorney, V. A. van der Byl.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

Ex parte SOLOMON. { 1898. Nov. 17th.

Mr. Jones applied for the admission of Arthur Solomon as an attorney and notary of the Supreme Court.

The order was granted, the applicant to appear in court and take the oaths the following morning.

WHITE, RYAN AND CO. V. ANNENBERG.

Mr. Buchanan, who appeared for the plaintiff, moved that the provisional order of sequestration granted be discharged.

The Court granted the order.

MONKWELL-STREET WAREHOUSE COMPANY V. J. J. KNIGHT AND CO.

Mr. P. Jones moved for provisional sentence on certain bills of exchange for £439 9s. 11d., with costs of suit. The bills of exchange had been presented at the Standard Bank, but refused on account of there being no funds.

Provisional sentence was granted.

NICHOLLS V. BENNETT.

Mr. De Waal applied for a writ of civil imprisonment against the defendant, on an unsatisfied judgment for £54 5s. 4d. due by virtue of an acknowledgment of debt dated April 1, 1898, with £18 6s. 4d. costs, together £72 11s. 8d. The writ of execution was issued on October 29, when a return of *nulla bona* was made.

The defendant appeared in person, and offered to pay the amount he owed by monthly instalments of £5 each.

The Court granted decree of civil imprisonment, to be suspended upon payment of £5 per month until the capital sums and costs shall have been paid, the first payment to be made on December 1.

FRASER V. PARKER.

Mr. Upington applied for provisional sentence on a promissory note for £100, dated June 1, 1898, made by defendant in favour of Dr. P. Ross, payable at the Standard Bank, Johannesburg, with interest from June 1, 1898.

Provisional sentence was granted, subject to the production to the Registrar of the certificate of presentation.

DARTER AND SONS V. GORDON MURISON.

Mr. Gardiner applied, under Rule 329 (*d*), for judgment for £59 1s. 6d., goods sold and delivered, with interest *a tempore morœ*.

The Court granted the order as prayed.

Ex parte SMUTS.

Mr. P. Jones applied for the rehabilitation of Hugo Hendrik Loedolf Smuts.

The order was granted.

GENERAL MOTIONS.

IN THE MATTER OF THE PETITION OF ALFRED WILLIAM STEVENS AND ANOTHER.

Mr. Upington moved for a rule *nisi* for leave to sue *in forma pauperis* in an action for damages against the Union Steamship Company (Limited).

Granted: returnable November 24.

CREWE V. BOTHA. { 1898. Nov. 17th. „ 21st. Dec. 19th.

Election petition—Paid agents—Scrutiny—Constitution Ordinance, sections 8, 10, 38, 50 List of voters—Minors—Aliens and convicted persons.

An election petition claimed, inter alia, *that the names of certain persons whom the petitioner alleged to be minors, aliens and convicted persons, and to have voted for the respondent, should be struck off in a scrutiny.*

Held *that the voters' list on which the names of these persons stood at the time of the election was conclusive as to their right to vote in terms of the proviso to the 50th section of the Constitution Ordinance.*

This was an argument upon the following legal point raised by the respondent upon the election petition filed against his

return : "Whether assuming that the facts stated in Clauses 5 and 6 of the election petition, and Clauses 1 to 4, inclusive of Schedule A, be correct, the objections thereby raised are valid in law."

The following were the clauses referred to:

Clause 5 of the petition.—That your petitioner maintains that the return of the said Jacobus Nicolaas Petrus Botha was undue and erroneous, and claims to have had a right to be returned as one of the members at the above-named election, as will appear from scrutiny of the votes cast and counted thereat.

Clause 6.—That certain persons voted at the said election and were reckoned upon the poll for the said Jacobus Nicolaas Petrus Botha, who were and had been disqualified by legal incapacity to vote, and who were prohibited by law from voting by virtue of divers statutes, or by the common law of Parliament.

Class 1 of Schedule A set out the names of certain voters and stated that their votes would be objected to on the ground that the voters were minors, and there not entitled to be on the register and incapable of voting.

Class 2 stated that the votes of certain other voters named would be objected to on the ground that the voters were aliens.

Class 3 stated a similar objection on the ground that the voters had been convicted of theft and sentenced at the Aliwal Circuit Court in the year 1896.

Class 4 contained a list of voters objected to on the ground that they were retained, hired, or employed for reward by or on behalf of one of the candidates for the purpose of the election as agent, canvasser or in some other capacity.

Mr. Innes, Q.C., and Mr. Graham, Q.C., appeared for the petitioner.

Mr. Searle, Q.C. (with whom were Mr. Solomon, A.G., and Mr. McGregor), for the respondent.

Mr. Innes: The point is whether it is legally possible to produce evidence at the trial as to whether the persons mentioned are entitled to vote. It depends upon the construction of certain sections of the Constitution Ordinance. Section 8 as a basis defines the persons who can claim any qualification at all, the framing of the section shows that the first qualification is that they must be male persons "not subject to any of the legal capacities hereinafter mentioned. Section 10 states the disqualification and enacts that no person shall be entitled to be registered as a voter, or to vote . . . unless he be of the full age of twenty-one years, &c.," by virtue of this section, minors, aliens, lunatics and persons convicted of certain crimes are disqualified not only from being registered, but also from voting if registered.

[Solomon, J.; The words "to be registered as a voter and to vote" occur also in section 8.]

That is not inconsistent. It has a bearing on section 50, which makes the register conclusive proof of the right to vote at elections for the Assembly.

The object of the Legislature was to give the right to vote only to persons who have the full right of citizenship. The provisions as to the conclusiveness of the register with respect to elections for the Assembly differ from those regarding elections for the Council, the latter are contained in sections 21 and 38. Section 38 enacts "that all persons whose names shall be inserted in the list of voters for any electoral division, but no other person, shall be entitled to vote in and for such electoral division for members of the Legislative Council." There is a variance between section 10 and section 50, but section 50 must be taken as the substantive clause, and the other as a proviso, if they can be made compatible the Court will not favour a repeal by implication. The question turns upon the meaning of "person" in section 50. The literal meaning cannot be taken, if so, it would include woman, which is impossible in face of sections 8 and 10. It must mean therefore every person not legally disqualified. Otherwise a whole school of boys might *per incuriam* be placed upon the register and they would then be entitled to vote.

[Solomon, J.: Would not the same argument apply to a man who is registered as having the wages qualification ?]

That is not so important because it is not a question of status. Some of these disqualifications may arise after registration. The matter came before this Court incidentally in *O'Leary* v. *Civil Commissioner of Kimberley* (6 Juta, p. 297). See judgment of De Villiers, C.J., at (p. 305).

[De Villiers, C.J.: But look at the judgment of Buchanan, J., with reference to this.]

That was only a dictum. The headnote of *Lord* v. *O'Leary* (5 H.C.R., p. 312) is not borne out by the case because the question of the conclusiveness of the register was not argued, the conclusiveness being admitted. It was held there that the names of paid agents should be struck off because of Act 9 of 1883, section 35. From the judgment of Solomon, J., that a convicted person cannot vote. If that is so section 50 of the Constitution Ordinance falls away.

[De Villiers, C.J.: There might be a distinction between a conviction before and a conviction after registration. In England in the Ballot Act there is a proviso that the register shall not be conclusive where it is against the law. That was enacted in 1872, but I think that before that it was decided that minors if on the register could vote.]

If section 50 is stringent then even persons convicted after registration can vote. In *Stowe* v. *Jolliffe* (L.R., 9 C.P., p. 734) a distinction was drawn between the two sets of disabilities, namely those which affect status and those which do not (p. 750). Section 8 of the Constitution Ordinance lays down the incidents of the franchise, but section 10 lays down disqualifications inherent in the person. The Court might not be able to go behind the register as far as the incidents of section 8 are concerned but it could do so with respect to section 10. As to the names in class 4, they appear to be covered by Act 9 of 1883, section 35 and *Lord* v, *O'Leary* (5 H.C.R., p. 312).

Mr. Searle: The Constitution Ordinance does not draw any real distinction between disqualification from want of status and any other disqualification; if the petitioner's argument is good, all persons not qualified under section 8 can be struck off. The words "and to vote" are there *ex abundanti cautelâ*. *Charlton* v. *Lings* (4 C.P., p. 274) deals with the qualification of a woman to vote.

[De Villiers, C.J., referred to *Voet* 1, 5, 1].

As to the modification of one section of an Act of Parliament by another, see *Maxwell on Interpretation* (2nd ed., pp. 35-37) and *Thompson* v. *Farrer* (9 Q.B.D., p. 372), on the principles there laid down section 50 cannot be modified by section 10. *Stowe* v. *Jolliffe* is a strong case and very much in respondent's favour. There are special disfranchising acts in England, 7 and 8 W. III c, prohibited minors from voting and yet Blackburn, J., in the *Oldham case* (1 O'M. and H., p. 159) held that if on the register they could vote. Section 38 of the Constitution Ordinance is also in our favour. *Hayward* v. *Scott* (5 C.P.D., p. 231). *Ryder* v. *Hamilton* (L. R. 4 C.P., p, 559).

I admit that *Lord* v. *O'Leary* applies to the case of the paid agents.

Mr. Innes in reply.

Postea (November 21st).

The Court fixed January 26, 1899, as the day of trial of the petition, the respondent to file his counter-charges in the meanwhile.

Postea (December 19th).

Judgment was delivered upon the legal question.

De Villiers, C.J.: The 50th section of the Constitution Ordinance, after enacting that no person shall be permitted to vote for any member of the House of Assembly except a person whose name is inserted in the list of registered voters, contains the following proviso: "That the list of registered voters for the time being shall, for all purposes and in all places, be deemed and taken to be conclusive proof of the right to vote of every person inserted therein, and no such list shall be opened up, or the right of any voter mentioned therein questioned, in any manner or by any proceeding, either in the Legislative Council or the House of Assembly." Subsequently, by Act 14 of 1874, elaborate provisions were made for the biennial registration of voters, every facility was given for the revision and amendment of the voters' lists, and the Civil Commissioners were empowered to inquire into complaints made after any election that persons not entitled to vote had been admitted to vote thereat, but the proviso just cited was not in any way modified. In 1883 the Legislature, by Act 9 of that year, transferred the duty of trying election petitions to the judges of the Supreme Court. The 8th section (sub-section 6) enacts that, on a scrutiny, every vote given for the respondent by any one who is proved to have been bribed or treated, or subjected to undue influence, or to have been guilty of personation shall be deducted from the total number of votes given for the respondent. It has been contended by the petitioner, and not denied by the respondent in the present case, that a further exception to the conclusiveness of the voters' list has been introduced by the 35th section of the Act of 1883, which enacts that no voter who, within three months before any election, shall have been employed for the purposes of the election for reward by any candidate as agent, canvasser, clerk, messenger, or in any other like employment, shall be entitled to vote at such election. That contention is supported by the case of *Lord* v. *O'Leary* (5 H.C.R., 312), in which the High Court of Griqualand held that the votes of paid agents could be struck off on a scrutiny, whether they voted for the candidate who employed them or for another candidate. In view of the admission made by the respondent's counsel, it is not necessary to inquire into the correctness of this decision. There is something to be said in favour of the view that paid agents were intended only to be prohibited from voting for the candidates who employed them, but it must be admitted that the reasoning of the learned Judges of the High Court in support of a more extended prohibition is forcible and weighty. At all events it is clear that the 35th section of the Act of 1883 in prohibiting "voters" who are paid agents from voting intended the prohibition to apply to voters whose names are on the list. The petitioner, however, proposes to strike off not only paid agents, but persons alleged to be minors, aliens, and convicted persons. The 10th section of the Constitution Ordinance enacts that no person shall be entitled to be registered as a voter, or to vote at any election who is a minor, an alien, or a person convicted of certain crimes, and it is upon this section that the petitioner relies. His counsel has asked the Court to construe the words "or to vote" as being equivalent to "or if so registered to vote," but he does not suggest that the same construction should be applied to the same words where they appear in the 8th and 9th sections. It would serve no useful purpose to quote these sections, but it is sufficient to say that if the same construction were applied to them the result would be that a person who is sole occupier of a house worth say £25 could not be objected to on a scrutiny, but that another person who is joint occupier in unequal shares of a house would be liable to have his name struck off, although his share in the house might be worth £70. The truth seems to be that the words "or to vote," in the 10th section, were used in the same redundant sense as the words "and to vote" in the 8th section, and the words "or to vote" in the 9th section. The 8th section defines the classes of persons who are entitled to be registered as voters and to vote, but the section would have had the same meaning if the words "and to vote" had been omitted. In the case of the Vryburg election petition this Court fully concurred in the view that the names of persons not qualified under the 8th section could not be struck off on a scrutiny, the reason being that under the proviso of the 50th section the list of registered voters is conclusive proof of the right to vote. Exactly the same reason exists why the names of minors, aliens, and convicted persons should not be struck off. It is important to bear in mind that the enactment making the list of registered voters conclusive proof of the right to vote is by way of proviso to a later section of the Ordinance. If the alleged prohibition contained in the 10th section had appeared in the 50th section itself, but before the proviso, there can be no doubt whatever that it would have been controlled by the proviso. In our opinion, it is equally controlled by the proviso, although contained in a different but earlier section. Mr. Innes, in his very able argument, has further asked the Court to draw a distinction between a disqualification caused by want of political *status* and disqualifications arising from other causes, but the Ordinance itself draws no such distinction. If he is correct in saying that the name of a woman who has voted would be struck off on a scrutiny, the reason is not because it is a question of *status*, but because of the general principle of our law which exempts females from the operation of Statutes conferring political franchises or imposing public duties unless females are specially included. Even, therefore, if the 8th section of the Constitution Ordinance had not confined the right to be registered and vote to male persons, women would not have been entitled to the benefit of the proviso contained in the 50th section. But there exists no similar rule of construction in regard to minors, aliens, and convicted persons. Their legal *status* may be the reason why the Legislature has enacted that they shall not be entitled to be registered, but there is nothing in the Ordinance to distinguish their case from that of a joint occupier who is of age but does not occupy a house of sufficient value, in terms of the 9th section, or even from that of persons who do not possess the qualifications required by the 8th section. Such clearly was the opinion of my brother Buchanan, as expressed in the case of *O'Leary* v. *Civil Commissioner of Kimberley* (6 Juta, 307). "I have," he said, "heard nothing in argument to induce me to change my opinion that the voters' list was final. The case was that of a minor, and I held that whether he was entitled to vote or not the Civil Commissioner could not," while his jurisdiction lasted, "go behind the list." That was no doubt an *obiter dictum* not necessary for the decision of the case, but in the subsequent case of *Lord* v. *O'Leary* (5 H.C.G., 312) the High Court of Griqualand came to a similar conclusion. There was not much argument on the point, but the three judges were unanimous in holding that the register was conclusive with regard to persons not entitled, under the 10th section of the Ordinance, to be registered as voters or to vote. The election cases decided in England are not of much assistance, for there the Legislature has in unequivocal terms prohibited these classes of persons from voting. For instance, Act 7 and 8, William III., C. 25, section 8, enacts "that no person whatsoever being under the age of twenty-one years shall be admitted to give his voice for election of any member to serve in this, or any future Parliament." Notwithstanding this enactment it seems to have been held by a committee of the House of Commons that an objection on the ground of minority not taken before the revising barrister could not be taken before the committee (*New Windsor Case*, cited in 9 L.R.C.P., 741). That was before election petitions were tried by judges, but in a subsequent case (*Oldham Case*, 1 O'M. & H., 159), Mr. Justice Blackburn held that minors and aliens could not be struck off on a scrutiny unless an objection had been first taken to them before a revising barrister. He further held that women were in a different position, and that their votes might be struck off, but that if it came to one vote he would reserve the point for the full Court. As to minors and aliens he seems to have entertained no doubt that their names could not be struck off. The effect of subsequent legislation appears to have been to alter the practice in this respect. In the present case the question does not arise whether the list is conclusive even where the disqualification has come into existence after the completion of the list. The alleged disqualifications existed before and at the time of the registration. It cannot, therefore, be said that no opportunity has been afforded for raising objections to the names of the persons now objected to. Every facility is afforded by our Statutes for striking from the list of voters the names of non-qualified persons, and it certainly never was intended that objectors should wait until a scrutiny takes place before raising their objections. In the case of *Moll* v. *De Villiers* (7 Sheil, 457) it was pointed out that, independently of statute, this Court has the power of correcting an illegality in registration authorised by a Civil Commissioner if the rights of an individual are infringed by such illegality. We have carefully considered the question whether, in case such a gross irregularity as the registration of minors, aliens, and convicted persons did really take place, the Court should not order a rectification *nunc pro tunc* of the list of voters. There are several difficulties in the way of such a course. One difficulty is that the order could not be made without due notice to the persons so registered, and no such notice appears to have been given. But the fatal objection is that the list of voters as it existed at the date of the election affords the requisite and only proof of the right to vote, and it would be contrary to every legal principle to make a retrospective order for the rectification of the list. The result, therefore, is that the objections to classes 1, 2, and 3 cannot be sustained. As to class 4, that of paid agents, the English Act of 1872 enacts that where, on a scrutiny, any person employed for reward by a candidate is proved to have voted these shall be struck off from the number of votes given to such candidate, one vote for every person who so voted and was employed for reward. No inquiry is made for whom he voted, but a vote is struck off from the total of the candidate who employed him. No such drastic measure has been adopted in this colony. In the present case it is not stated by whom the paid agents alleged to have voted for the respondent were employed, but in view of the admissions made by his counsel the point is immaterial. That admission I understand to apply only to such persons as were employed by either candidate for the *bona-fide* purpose of assisting him in his election. The objection raised by the petitioner to the fourth class will be allowed, and the costs of this application will be costs in the cause.

Mr. Justice Maasdorp concurred.

Mr. Justice Solomon said that he also entirely concurred. He had occasion some years ago in the election petition of Lord v. O'Leary to consider very carefully the meaning and object of section 50 of the Constitution Ordinance. The points were not then so fully argued as in the present case, but after careful consideration, he expressed very fully the conclusions to which he had come, and he saw no reason whatever for altering the opinion he formed on that occasion. He saw no reason why the registration should not be conclusive evidence in cases falling under section 50.

[Petitioner's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorney, V. A. van der Byl.]

IN THE ESTATE OF THE LATE HECTOR JOHN SHAW.

Mr. Buchanan moved for an order authorising the Master to make certain payments towards the education of the minor children of the late H. J. Shaw. The petitioner (Margaret Shaw) had been married in community of property to the deceased who died without a will, and a certain sum of £1,232 19s. 3d. was deposited to the credit of the minor children in the hands of the Master of the Supreme Court. There was a further sum deposited to their credit out of the estate of their deceased sister, making the total £1,504 3s. 3d. The petitioner had been supporting herself and her children for the last eleven years, ever since her husband's death, partially by the interest on a small sum coming to her and partially by her own efforts. While the children were young she could do that, but now that they were growing up their wants had increased, and her means were insufficient to pay for clothing, education, &c. She therefore asked the Court to authorise the Master to pay out of the estate £18 a year, so as to better educate and clothe the minors until such time as they were better able to provide for themselves.

The order was granted.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

WOLFAARD V. COLONIAL GOVERNMENT.

1898.
Nov. 18th.
,, 19th.

Trespass — Pumping water — Damages.

This was an action for £2,000 damages, instituted by Christoffel Johannes Wolfaard against the Commissioner of Public Works, as representing the Colonial Government.

The declaration alleged:

1. That the plaintiff is a farmer, residing at Mielliesfontein, in the district of Hanover, and that the defendant is the Commissioner of Public Works, and is sued in that capacity as representing the Colonial Government.

2. The plaintiff is the owner of the said farm Mielliesfontein, across which farm a certain line of railway, being portion of the line between Naauwpoort and De Aar, was in or about the year 1883 constructed by the Colonial Government, and has since that time been maintained and worked by the said Government.

3. In or about the year 1883 the said Government wrongfully and unlawfully entered upon certain land belonging to the plaintiff, and being portion of his said farm, and unlawfully sunk a well upon the said land, and wrongfully and unlawfully used the water from the said well for the purposes of the said railway from the year 1883 down to the end of the year 1897.

4. In consequence of the wrongful sinking of the said well, as set forth in the preceding paragraph, a certain fountain which had been in existence upon the plaintiff's farm prior to the year 1883 was deprived of most of its water and became almost dry, and the plaintiff suffered great loss and damage by reason of that fact.

5. A certain stream called the Sea Cow River forms the boundary of the plaintiff's said farm, and the plaintiff is entitled as a riparian owner to a reasonable share of the water in the said stream. The Colonial Government is not a riparian owner of land along the course of the said stream.

6. In or about the year 1895 the Colonial Government, without the plaintiff's sanction, and without the consent of the owner of the farm Andriesfontein, erected an engine and water-tank upon the said farm Andriesfontein, and made a cutting or furrow in the bed of the said river for a distance of about ninety yards, and also constructed a dam wall in the said river and stopped the natural flow of the water in the said river.

7. During the years 1896 and 1897 the said Government wrongfully and unlawfully pumped large quantities of water from the said stream and used the said water for watering engines and other railway purposes, and none of it was ever returned to the said stream.

8. The plaintiff sustained great loss and damage on account of being deprived by the action of the said Government of the use of

that reasonable share of the water of the said stream to which he was by law entitled.

9. The damage which the plaintiff has sustained by reason of all the wrongful acts of the Government as hereinbefore set forth is the sum of £2,000.

Wherefore the plaintiff claims :

(*a*) Payment of the said sum of £2,000 as aforesaid.

(*b*) A declaration of rights.

(*c*) Alternative relief and costs.

The defendant in his plea admitted paragraphs 1 and 2 of the declaration. As to paragraphs 3 and 4 he admitted that the engineers of the Railway Department in or about the year 1883 entered upon a part of the plaintiff's farm Mielliesfontein, which had been lawfully expropriated for railway purposes, and sunk a well on the portion of the farm expropriated as aforesaid. The defendant admitted that the Railway Department used the water from the said well for railway purposes from 1883 to 1897.

With reference to the said paragraphs the defendant specially said that on or about the 29th December, 1897, the plaintiff and the Colonial Government entered into a written agreement, to which he craved leave to refer at the trial of this action, in terms of which the plaintiff agreed to allow the Colonial Government to use the water in the spring and well referred to in paragraphs 3 und 4 of the declaration, and to use other water on the plaintiff's said farm, in consideration of the Colonial Government paying the plaintiff the sum of £300 per annum for the use of the said water.

The said agreement was subsequently embodied in a notarial deed, executed on the 17th February, 1898, and registered as a servitude against the plaintiff's farm Mielliesfontein on the 14th June, 1898.

The plaintiff accepted the said sum of £300 per annum, and entered into the said agreement as full satisfaction and compensation for the injuries alleged to have been sustained by him, as set forth in paragraphs 3 and 4 of the declaration.

The defendant admitted paragraphs 5 and 6 of the declaration. As to paragraph 7 of the declaration, the defendant admitted that during the years 1896 and 1897, the Railway Department pumped water from the Sea Cow River, and used the water for watering engines and for other railway purposes, and that none of the said water was returned to the said stream.

As to paragraphs 8 and 9 of the declaration, the defendant denied that the plaintiff had sustained damage in the sum of £2,000 by reason of the action of the Railway Department, as set forth in paragraphs 3 and 4 of this plea. The defendant said that if the plaintiff did sustain any damage, such damage was merely nominal, and that he had tendered the sum of £25, with taxed costs to date of tender, in full satisfaction of any damage which the plaintiff might have sustained, but the plaintiff refused to accept the said tender. Subject to the tender, he prayed that the plaintiff's claim might be dismissed, with costs.

The replication admitted the execution of the contract, and said that the contract in no way covered the trespasses set out in the declaration. It admitted the tender, but alleged that it was insufficient, and generally joined issue on the plea.

Mr. Searle, Q.C., and Mr. Close appeared for the plaintiff.

Mr. Sheil, Q.C., and Mr. Benjamin for the Government.

Wilfred B. Murray, Government land surveyor, practising at Colesberg, said he knew Mielliesfontein. He had been on the farm several times surveying. The plan put in showing the Government railway-station on the farm, the well, the fountain, and the Sea Cow River, was prepared by him. The distance between the plaintiff's fountain and the Government well was 2,360 feet. Witness had inspected the land between the fountain and the well. There was an indication on the surface of the ground that there was an underground connection between the fountain and the well. There was a certain formation which could be traced from one place to the other. About three-fifths of the land which was formerly cultivated there could not now be cultivated. There was a slope from the well to the spring, the former being about 6¼ feet higher than the latter. The yield of the spring when there was no pumping going on at the well was 64,000 gallons per twenty-four hours. Of the two furrows he had marked on the plan only the lower one was now in use. The well was about 50 feet from the railway line.

Christoffel Johannes Wolfaard, the plaintiff, stated that the Hanover-road Station was situated on his farm, and the railway line ran over it. His consent had never been asked for the erection of buildings, pumping-station, or anything of that kind there. Witness bought the farm in 1872 or 1873. He then cultivated about 25 morgen, which he irrigated out of the fountain. He grew wheat, potatoes, oats, and produce of that kind. In 1884 the Railway Department sank a well close to the station, where a piece of land was fenced in and trees planted. In 1883 plaintiff forwarded a claim for compensation to Government, which was not entertained. After the well was made the water in it was used for railway purposes, and the stream of water in witness's fountain became weak. In 1885 plaintiff deepened his fountain, but the Government people sunk their well deeper, and the water became so weak that witness could not use it. The well took away two-thirds of the water from the fountain. On witness's instructions his attorney communicated with Government, and in reply Government offered £150 as compensation, but plaintiff would not accept that. After that plaintiff could not cultivate the 25 morgen of ground. The most he could cultivate was from 6 to 10 morgen. This land he irrigated from the lower furrow. In 1894 witness requested the Government to discontinue using the well. The Government said they would not use the well any more, and witness, by sinking his fountain and furrow, got a good supply of water. A fortnight later, however, the Government again deepened the well, and the water in the fountain became a little weaker, but afterwards kept its flow. Witness made another bore-hole in 1897, which was a dry year, and got 4 inches of water, but on the Government well being deepened that water was taken away. Witness was certain there was a communication between the fountain and the well. There were indications on the surface of such. By reason of the tapping of the well witness had lost from 1884 to 1894 more than £300 per annum through land going out of cultivation. He used to get from thirty to forty-five bags of wheat from each morgen of ground. He sometimes got £1 10s. a bag; generally above £1 During the last three years, from 1894, he had suffered damage to the extent of £60 a year. In 1895 the Government, without asking his permission, put up a pump on the Sea Cow River Witness's sheep used always to water at a permanent pool in that river. The Government pumped all the water from the pool, and constructed a furrow, conducting all the water to the station. Witness could not water his sheep there after that. He had lost 120 sheep through that cause, for in consequence of the rapid drying up of the river he had had to drive them to a higher pool, and they were either lost in the mud or when taken out were so coated with mud that they died. He asked the Government for £300 damages for the pumping of the water from the Sea Cow River.

Cross-examined: Witness's farm was a quitrent farm. There was a second fountain on the farm, but the stream was weak. There could not be a yield of 43,000 gallons of water per diem from that fountain. He had made money at his farm, and sent large supplies of produce by railway from Hanover-road Station. He could not say if he sent 27 tons of produce away last year, but he sent a large quantity. He had sent between 400 and 500 bags of potatoes to Kimberley last year, although it was a year of drought. Witness had bought the farm for £2,000. He had sold thirty-six morgen of that land, with an hotel he had built on it, for £1,800. He had never reported the loss of his sheep to Mr. Rose, the District Railway Engineer. Witness knew that a farmer further up the river had put up a dam.

P. E. Wolfaard, a nephew of the plaintiff, who lived on an adjoining farm, deposed that in October, 1897, he, in conjunction with his cousin, measured the flow of water at the fountain. They measured the water with a foot-rule, and gave the breadth and the thickness of the stream. They did not take the velocity of the stream. The water on the last day they measured was less than on the first. During that time blasting had been going on at the Government well.

P. E. Wolfaard, son of the plaintiff, said that in 1894 he bored at the fountain and got a strong stream—after that they worked at the well for three days—they blasted: the water then got weaker and remained weak—about the same as before he bored. It remained like that till October, 1897. In October, 1897, he bored again and then Government bored and the stream again got weaker. He took measurements, the measurements put in were correct. The crops suffered in October, November, December, 1897. The Railway put up the pump in 1896. Witness corroborated as to the loss of the 120 sheep through mud sticking to them. They drank at the fountain, it was about three miles from the grazing ground. There was communication between the fountain and the Government well, Cross-examined: Last year the crops were poor, almost a failure, it was a bad year, they had a good crop of potatoes.

C. H. Brumm, a shopkeeper at Hanover-road, said that in 1889 he was on the farm and gave evidence as to the extent of its cultivation. In 1894 he had a well on the property 20 feet deep. That well was 100 yards from the Government well, it was believed that there was communication between his well and the Government well.

Cross-examined: There were two fountains on plaintiff's farm: he could not say that plaintiff's crops suffered from want of water.

B. I. de Villiers, law agent acting for the plaintiff, said that he had also acted for one van der Merwe, who claimed damages from Government the claim was settled by payment of £50 damages. Witness had written a letter on the 10th February, 1898, to Government without authority from the plaintiff. He knew nothing about the settlement between plaintiff and Government.

Cross-examined: He had heard from plaintiff that he got £300 a year, but did not hear from him that it was in settlement of his claim.

L. J. Coetzee said he acted for plaintiff in drawing up the agreement in December, 1897. He had acted for him from November, 1897.

This closed the plaintiff's case.

For the defence,

J. W. Rose, District Engineer at Naauwport, said the well was sunk before his time, it was higher than the fountain, the distance between them was 800 yards, the level of the ground at the fountain was 7 feet below the well, the level of the water as it flowed out of the fountain was 7ft. 3in. above the bottom of the well, the yield from the fountain was 40,000 or 45,000 gallons in the middle of last year: witness had opened the fountain, and they pumped from it in the day-time: they took 25,000 gallons daily, his opinion was that there was no communication between the fountain and the well, the supply to the well came from an opposite direction. In November, last year, the water in the well did not rise to the level at which it ran out of the fountain: it only rose two feet and was then 5 feet below the fountain level. There was another fountain on the farm which was as strong as the first before it was opened up. Witness was frequently at Hanover Road, but the plaintiff never complained to him of losing water from the fountain. In November last he had a conversation with the plaintiff and the latter then said his theory was that owing to the shots fired in the well a fissure had been caused under his fountain through which the water was escaping. Witness did not think this was possible, light charges of dynamite had been used, and they had had no effect upon the roof of the tunnel which connected two portions of the well.

The pump in the river was erected by witness, the bed of the river was perfectly hard in dry weather, there were other pools where the sheep could be watered, these were as deep and large as the one where the pump was erected, plaintiff complained of loss of sheep after the claim had been made.

Cross-examined: We did not make a furrow 30 or 40 yards long. We left enough water in the pool, we took all we could get, 1897 was a dry year. In October, 1894, we cleaned out the well. I did not know the plaintiff had deepened his fountain, our well is 29 feet deep, the bottom of the well is deeper than the bottom of the fountain.

Re-examined: Plaintiff said he wanted compensation for the Sea Cow River.

By the Court: We blasted to widen the well. Plaintiff has cut into the earth, the water bubbles up from the bore-holes, 8,000 or 10,000 gallons are taken at the well, we require 30,000 to 35,000. Eighteen engines run, they get 6,000 gallons of water a day from the well.

W. Helmore, a quarryman in the railway service, gave evidence that he had used small charges in the well because the roof was shaking. The water came in from De Aar side, and not from the fountain side. When the well was pumped out only a little dribbling came from the fountain side.

F. Johnson, a ganger, said he daily passed the place where the sheep were said to have died, but had never seen any dead sheep there. The bed of the river was naturally sandy, there was a little mud on top.

Mr. Searle, called upon the question of damages, said that £300 a year was the recognised value of the water from the fountain and well. £100 a year would be the fair value of the well water. There has been no expropriation, there has been no leave and licence.

[Solomon, J.: Can you claim damages for all the years from 1883.]

There is no prescription of actions of this kind.

[De Villiers, C.J.: There is no proof of damage.]

We have lost sheep through want of water.

[De Villiers, C.J.: That assumes that there was a connection between the fountain and the well.]

Even if there was not we could have used the well water, we might have ejected the Government.

As to damages for taking the river water we lost 120 sheep, and their value is from eighteen to twenty shillings each.

[Solomon, J.: Is not that damage too remote, they did not die from want of water.]

They died when struggling to get at the water. The principle laid down in *De Villiers* v. *Van Zyl* (F., p. 77) should be applied here.

Mr. Sheil, called upon as to the sufficiency of the tender, plaintiff advanced no claim to Rose in his conversation with him, there is no reference in the correspondence to the loss of these 120 sheep. There must have been contributory negligence in allowing the sheep to get into the mud.

[De Villiers, C.J.: The test is not so much what number of sheep died, but the general loss and inconvenience caused by the want of water, and having to take sheep some distance for watering.]

There was no necessity for taking them two or three miles as the plaintiff says he did. The claim is not a *bona-fide* claim.

Mr. Searle in reply.

De Villiers, C.J: It is quite clear that the first claim, for the wrongful sinking of the well, would never have been made unless the plaintiff believed that the sinking of the well had some subterranean connection with the fountain. But he has wholly failed in showing any connection. The evidence goes to show that the water in the well comes from a different source to that which supplies the fountain. If there is no connection between the fountain and the well it appears to me that the sinking of the well in no way damages the plaintiff. It is not a question now of a nuisance but a question of damages and in the absence of proof of damage the plaintiff must fail.

Then there is the second claim, in which he asks for damages by reason of the pumping of water out of the Sea Cow River. The defendant admits liability for the use of this water, and he tenders £25 and the question is whether this sum is sufficient. Letters have been put in, sent by the plaintiff to Mr. Rose, the District Engineer, one of them shows that the District Engineer knew what the claim was, and that in February, 1898, the defendant had knowledge of the fact, that this water had been used for watering stock; notwithstanding that he continued to use this water. It is proved that 120 of the sheep have been lost by reason of the pumping out of the water. I am of opinion that the tender of £25 is not sufficient, especially as the Government has had the use of the water during the period of two years. Judgment will be given for the plaintiff for £60 and costs.

Postea (November 19th).

Maasdorp, J., said the Court had been considering the question of the expenses of the surveyor in this case, and they had come to the conclusion that as the surveyor gave no evidence upon the point upon which the plaintiff was successful, his witness's expenses could not be allowed. That portion of the judgment would therefore read: Costs to be paid by the defendants, with the exception of the witness's expenses of the surveyor.

[Plaintiff's Attorney, Gus Trollip; Defendant's Attorneys, Messrs. J. and H. Reid & Nephew.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hons. Mr. Justice MAASDORP and Mr. Justice SOLOMON.]

TARKASTAD DUTCH REFORMED CHURCH VS. TARKASTAD MUNICIPALITY. { 1898. Nov. 21st. " 22nd.

Municipal regulations—Conditions of sale—Interdict—Prescription.

One of the conditions of sale upon which lots of land laid out for a township were sold by the owner of certain farms by public auction was that the purchasers should not be entitled to dig gravel, quarry stone, erect brickkilns, or make and burn bricks upon the commonage *or village lands without the consent of the owners. The conditions were duly registered in the Deeds Office. Subsequently a municipality was established in the township.*

Held, *that a municipal regulation authorizing the Commissioners to grant permits to erf-holders to dig gravel, quarry stone and make bricks on the village lands did not legally justify the performance by the Commissioners of these acts without the consent of the plaintiffs to whom the original vendors had transferred the unsold portion of the farms together with all the vendors' rights in the village lands.*

This was an action for a declaration of rights.

The plaintiffs' declaration was as follows:

1. The first-named plaintiff is the minister and the remaining plaintiffs are the churchwardens of the Dutch Reformed Church at Tarkastad, and as such they constitute the Consistory, for the time being, of the said church. The defendant is the Municipality of Tarkastad, duly incorporated under the provisions of Act 45 of 1882.

2. On or about the 16th June, 1864, certain land, being portion of the remaining extent of the farms Schaapkraal and Boschfontein, in the district of Cradock, was transferred to and became the property of certain persons forming a committee of the Dutch Reformed Church at Tarkastad.

3. In or about the year 1862 the said committee caused certain erven to be surveyed and laid out upon the said land, and disposed of a large number of the said erven by public auction. The said erven were sold subject to certain conditions which were registered with the title deeds. The plaintiffs annex hereto a printed copy of the said conditions, which they ask may be considered as forming part of this declaration.

4. On or about the 17th June, 1870, the said committee duly transferred to the Consistory of the Dutch Reformed Church at Tarkastad for the time being, all the land referred to in paragraph 2 hereof, save and except so much thereof as had already been cut up into erven and sold as aforesaid, and the plaintiffs are now the registered owners of the whole of the said land outside such erven.

5. The village of Tarkastad was thereafter constituted a Municipality under the provisions of Ordinance 9 of 1836, and in or about the year 1883 it was duly incorporated under Act 45 of 1882; the limits of the Municipality of Tarkastad are coterminous with the boundaries of the portions of the farms Schaapkraal and Boschfontein, of which the plaintiffs as aforesaid are the registered owners.

6. The land referred to in the 9th, 10th, and 11th of the said conditions of sale as town commonage and village lands, comprises that portion of the farms Schaapkraal and Boschfontein, which is still registered in the name of the plaintiffs, and which has not been cut up into erven and disposed of as aforesaid, and by the 18th of the said conditions the right is expressly reserved to the plaintiffs to sell more erven from the village lands from time to time for the benefit of their Church.

7. Notwithstanding the rights of the plaintiffs as registered owners of the said commonage and village lands, and notwithstanding the terms of the said conditions of sale, the defendants have at divers times since the year 1870, and especially during the year 1897, wrongfully and unlawfully done the following acts: (*a*) They have themselves dug gravel and quarried stone upon the commonage and village land, and have purported to authorise other persons to do so, without obtaining the permission of the plaintiffs, and without asking them to point out a suitable place or places for the said purposes; (*b*) they have granted permits for the making and burning of bricks upon the commonage and lands without first obtaining the consent of the plaintiffs thereto; (*c*) they have erected permanent pens or enclosures for stock upon the said commonage and lands without the permission of the plaintiffs being first obtained.

8. The plaintiffs contend that the defendants are not entitled to dig gravel or quarry stone or make bricks or erect permanent pens or buildings upon the said commonage or village lands, or to authorise others to do so, without first obtaining permission of the plaintiffs, and then only upon the spots with reference to which such permission has been granted. The defendants wrongfully contend that they are entitled as of right to act in the manner detailed in paragraph 7 of this declaration. The plain-

tiffs, as a fact, are willing to sanction and point out suitable spots for the said purposes, if applied to.

9. The plaintiffs have a right under the said conditions of sale to sell more erven from the village lands from time to time, and they say that any erven so sold are entitled to be supplied with water for household purposes from a certain spring or fountain rising upon the plaintiffs' land, and utilised for the supply of water to the village. The defendants contend that no erven sold hereafter by the plaintiffs will be entitled to any share of the said water, either for domestic use or for purposes of irrigation; and they deny the right of the plaintiffs to sell any erven which will be entitled to any water whatever from the said spring.

10. By reason of the wrongful acts and contention of the defendants, as aforesaid, the plaintiffs have been and are prejudiced in their rights. The spots at which gravel has been dug, stone quarried, and bricks made and burned are such as to interfere materially with the exercise by the plaintiffs of the right to sell new erven in the future, and the wrongful denial of the defendants of the right of such new erven to be supplied with water has also injured the plaintiffs in regard to the exercise of the said right of sale.

The plaintiffs claim: (*a*) An order declaring that the defendants are not entitled to dig gravel, quarry stone, make and burn bricks, or to erect permanent pens or buildings upon any part of the said commonage or village lands, or to grant permits to others for the said purposes, save with the permission of the plaintiffs and at the spots pointed out by them; (*b*) an order interdicting the defendants from doing any of the said acts or issuing permits therefor, save upon the permission of the plaintiffs as aforesaid; (*c*) an order declaring that any new erven sold hereafter by the plaintiffs shall be entitled to a *pro rata* share of the water of the spring referred to in paragraph 9 hereof for domestic purposes; (*d*) payment of the sum of £100 for damages.

The defendant Council pleaded as follows:

1. For a plea in abatement to so much of the declaration as claims an order, declaring that any new erven sold hereafter by the plaintiffs shall be entitled for domestic purposes to a *pro rata* share of the water of the spring referred to in paragraph 9 of the said declaration, the defendant Council says that the said claim is bad in law, inasmuch as the said Council is not the owner of the erven within the village of Tarkastad, the owners of which erven, who are no parties to this suit, have under the conditions of sale annexed to the said declaration such rights, in respect of the water of the said spring, as are by the said conditions conferred, which rights such an order as is therein claimed would directly affect. Wherefore the defendant Council prays that paragraph 9, and so much of paragraph 10 as relates to the complaint of the plaintiffs in respect of the water of the said spring, and prayer (*c*) may be expunged with costs.

2. For a further plea they admitted the acts alleged in paragraph 7, but denied that they were unlawful, and said that ever since 1863 the Commissioners first and then the Council of the Municipality had continually and as of right done such acts and erected such buildings, fences, &c., as were necessary for the proper management of the village, and had expended large sums of money in and about the same, and had acquired by prescription the right to do such acts. They said moreover that the plaintiffs had always acquiesced in these acts, and acknowledged the right of the Commissioners and Council. As to paragraph 9 of the declaration they did not deny the plaintiffs' right to sell more erven from time to time from the village land provided that the rights of the defendant Council were not interfered with by such sale.

Issue was joined on this plea.

Mr. Innes, Q.C., and Mr. Graham appeared for the plaintiffs.

Mr. Searle, Q.C., and Mr. Molteno for the defendants.

Upon the plea in abatement Mr. Searle said that under the 16th condition of sale certain water-rights were attached to each erf in the village.

The proper course would have been to have brought a special case against an individual erf-holder as a test case.

[De Villiers, C.J.: Even then ought not the Commissioners to be joined?]

I admit that.

[De Villiers, C.J.: Then we might hear the case as against the Commissioners, reserving the question as to the effect of any judgment as against the erfholders.]

The onus of proof as to the prescriptive right having been acquired having been laid on the defendants, Mr. Searle put in the Municipal Regulations.

James Francis stated that he had resided in Tarkastad since 1864, and owned property there. He was at one time a member of the Municipal Council; in 1864 while he was a member resolutions were passed with regard to brickmaking, &c. To the best of his knowledge, these resolutions had been carried out. A quarry (marked No. 1 on the plan) had been started before the municipality was constituted. Quarry No. 2 was opened a long time afterwards, and there was also another quarry, but both it and quarry No. 2 had been abandoned for a long time, and only quarry No. 1 was now in use. So far as witness knew, no one had been allowed to quarry without a licence from the Municipality, and a licence was also required for making bricks. People had been fined for making bricks without a licence. Witness had at different periods between 1864 and 1891 been a member of the Municipal Council, and during that time the Kerkeraad had never objected to the making of bricks or quarrying at the spots now complained of. A pound had been established on the commonage, and that had never been objected to. Before the present gravel-pit had been discovered they used to get their gravel from quarry No. 1. While witness was a member of the Municipal Council the Rev. Mr. De Villiers, the minister of the Dutch Reformed Church there, had applied verbally through him for permission to cart gravel, which had been granted, but no charge was made. Several members of the Dutch Reformed Church Consistory had also been granted similar permission. The pens objected to had been erected about two years ago. They were erected for periodical stock sales. These were formerly held at the pound kraals, but that was found to be very inconvenient. At the time witness never heard any objection to the erection of those stock pens. Plantations had been made on the north-east side, and two cemeteries, one for whites and one for natives, had been laid out and enclosed, and no objection had been raised. A rifle range, racecourse, cricket and tennis grounds, lazaretto, hospital, sheep-dipping tank, &c., had been erected on the commonage. A native location had been established on the north side. The Council had made a reservoir on the commonage, the source of the water being upon the commonage on the farm Bosfontein. The reservoir was recently finished, but the pipes were laid down in 1880. Shambles were erected on the north-west side of the town, and with regard to these a letter was written to the Council by the Kerkeraad, asking for £1 a year as quitrent for the ground on which the shambles were built. The Municipality did not entertain the demand. In 1885 the Rev. Mr. De Villiers again wrote concerning that claim, but since then nothing had been heard of the matter, and the £1 a year had never been paid. Witness was one of the sub-committee appointed to come to some arrangement with the Kerkeraad with regard to the purchase of all their rights. That was as far back as 1884, but the matter fell through, as no agreement could be arrived at. The Municipality had always received all the benefit of works on the commonage. As far as witness was aware, the Municipality had had the whole management of the commonage, and had never allowed the Kerkeraad to interfere with any of the buildings or works on the commonage.

Alexander McEwan said he remembered the constitution of the Municipality. At that time there were about thirty or thirty-five houses in existence; the stone for the building of these houses had been obtained from quarries No. 1 and No. 2. Witness was a Councillor for about thirteen years, from 1867 to 1880. He and his brother had built about fifty houses in Tarkastad. Before the constitution of the Municipality they dug where they liked, but after that they had to take out licences, and certain spots were pointed out by the Town Clerk. Licences had also to be taken out for bricklaying The stone dam, which stood where the reservoir now stands, was made in 1865. The Kerkeraad had never until now hampered the Council in any way.

Cross-examined: Witness took up the position that after the establishment of the Municipality so long as the Council did everything for the benefit of the Municipality there was no necessity for them to consult the Kerkeraad.

Peter McEwan, a brother of the last witness, gave corroborative evidence. Witness was one of the sub-committee appointed to consider the site of the shambles. There was no member of the Kerkeraad present to point out the site. Witness first heard about the commencement of 1897 of the Kerkeraad taking up the position which it now did. The Municipality had done nothing to interfere with new erven in the town. The Municipality had never passed any resolution with regard to supplying water to new erven. That question had never come before the Municipal Council. The Council had spent over £1,702 on the waterworks on the commonage. With regard to the offer of £2,500 made to the Kerkeraad for all their rights, he was concerned in the second offer. That offer of £2,500 was based upon the capitalisation of the quitrents.

Cross-examined: As a ratepayer he maintained that new erven would not be entitled to water from the spring, but he could not speak as a Councillor, the matter never having been before the Council.

James Whitaker said he was a labourer at Tarkastad. When he arrived there, there were two houses: he worked with McEwan; quarried stones and rode bricks. Witness opened quarry No. 1 before there was a municipality. He also opened No. 2. His son was 35 years old and it was before his birth. After the establishment of the municipality he was charged for a licence.

Cross-examined: Witness opened No. 1 quarry before Waldek opened it to a depth of five feet. When Aldum came the quarry was five feet deep.

For the plaintiffs.

J. W. Murphy, a carpenter and builder, said he had made the plan put in. He had lived in the place 36 years. He remembered quarry No. 20 in 1876, it was near the Park, there was no quarry No. 6, that was nothing but a mass of surface stone pulled up here and there. Waldek opened that quarry about 20 years ago. There was a small quarry at No. 5. The quarry at the Park was older. No. 7 was opened in 1891 or 1892. Other gravel pits were opened in 1895. All the excavations were made since his time. The first lazaretto was made in 1882, the shambles in 1884.

Cross-examined: I quarried at No. 6.

Mrs. Aldum said that she went to Tarkastad in 1876—her husband was a stone quarryman, and took a sub-contract for the church. No. 20 was then a place from which stone had been taken out, it was worked out; at No. 6 only surface stone had been taken out. Witness was there continually, her husband tried to quarry but a Mr. Waldek stopped him and said it was his quarry: then he went to No. 5 and took it for two years. The Council let it, then he came to Waldek's quarry and quarried there; the stone was all used for the church.

P. H. Dowdle said he lived at Tarkastad from 1875 to 1896. There was only a disused quarry at No. 5 in 1875. He remembered Waldek working at No. 6. He knew old Mr. van Heerden and remembered him reading the condiitons of sale.

Cross-examined: Witness knew of the discussion about getting transfer of the squares. They called all the places quarries where the surface had been removed.

Emanuel Smith said he was 32 years old and had lived at Tarkastad since he was four. Witness gave further evidence as to the existence of the quarries in his time.

D. A. Greyling, 50 years old, said he lived at Tarkastad just after the sale in 1862. His father at the time rode stone between the two quarries. There was no quarry at all then. The first was No. 5 in 1876.

L. J. van Heerden said he had been a member of the Consistory of the Dutch Church for eighteen years off and on. The first stones taken out of quarry No. 6 were as far as he knew for the church. He was not a member of the Consistory during the building of the Church. He remembered the sale of erven in 1862. They took gravel from No. 6, but there were no regular gravel pits. Witness had attended many deputations and read the conditions having relation to the matter during the discussion. He told the Municipality in 1896 that they could not take gravel unless the Church allowed it. He was sent as a Commissioner to them in 1896. Mr. McEwan said they would take over the boundary fence if the Church would give transfer. Witness reported this to the Kerkeraad. The Kerkeraad does not want any of the buildings destroyed, it only wants its future rights defined.

The following are the more material of the conditions of sale affecting the issue:

9. During the time that any house or other building shall be in course of erection on any erf, it shall be lawful for the proprietor or occupier of such erf to keep on the Town Commonage one span of oxen: provided, however, that this right or privilege shall be considered to extend only for such length of time as any such proprietor or occupier could reasonably have erected such house or building, and no longer.

10. No bricks shall be made or stones quarried on any portion of the village lands nor shall any brick-kilns be erected or bricks burnt anywhere within the village or on the village lands, except on such spots as shall be pointed out by the churchwardens or some one duly authorised by them.

11. None of the thorn wood (Mimosa), or other wood growing on the village lands shall be cut down or removed for fuel or otherwise without the authority, in writing, of the churchwardens, or some one duly appointed by them to grant such authority.

16 Within one month from the day of sale, or on such day as shall be notified by the auctioneer at the conclusion of the sale, a meeting of the purchasers of erven at Tarkastad shall be held in the village, at which meeting the purchasers present shall, by a majority of votes—each purchaser having one vote for every erf purchased by him—elect five persons from among themselves to act as a Committee, to frame and carry out such regulations as may be deemed necessary with regard to the making and preservation of dams, waterfurrows, and streets, in and for the village, and for raising the necessary funds for those purposes; for distributing the water for irrigation in equitable proportions to the respective water erven shown on the plan of the village, whether sold at the present sale or not, and to the parsonage; also with regard to the quantity of stock to be allowed to be depastured on the village lands by each erfholder or inhabitant, for the establishment of a pound at the village, and generally for the maintenance or order in the village and on the village lands; and such regulations from time to time made shall be binding upon the proprietors of erven and inhabitants of Tarkastad, and upon all persons whom it may concern; but neither the regulations so made, nor any Municipal regulations hereafter to be made, shall in any way deprive the Churchwardens of, or vest in any other person whosoever, the right to sell, let, or otherwise dispose of or appropriate any portion of the land within or attached to the village not disposed of at the present sale; and no water-rate or tax for the formation or maintenance of dams, waterfurrows, or streets, and no other local tax of any description, shall be imposed or levied upon any erven which shall not be disposed of at the present sale so long as the same remain unsold; nor shall any such rate or tax at any time be imposed or levied upon the "parsonage" or other property of the Church, or upon any of the sites reserved for the Church, market, or for other public purposes; but the water allotted for irrigation to such water erven shown on the plan of the village which shall not be sold at the present sale, may be assigned by the committee to any of the other water erven until the said reserved erven are sold. Provided, always, that such committee shall not at any time hereafter frame any regulations calculated to set aside or alter any clause in the original conditions of sale, without the consent of the Synod of the Dutch Reformed Church.

18. The Churchwardens shall have the right of selling more erven from the village lands, from time to time, for the benefit of their Church.

The following were amongst the regulations of the municipality:

27. No brick, lime or charcoal kilns shall be allowed in the town except by special permission of the Commissioners, who shall always have the right of letting out plots of ground belonging to the municipality, and to be held by the renters on such terms and under such regulations as the Commissioners shall deem expedient; and any person establishing brick, lime or charcoal kilns on the municipal lands without such permission shall be liable to a fine of one pound sterling and forfeiture of materials.

28. Each occupier or proprietor of an erf shall have the right of quarrying stone for the purpose of building on any erf in the town, provided, always, that such stone shall be quarried at such places and under such regulations as the Commissioners shall appoint and direct; and provided, always, that no charge be made on any stone quarried for buildings intended for public worship, education, or charity, or for buildings for the service of Government, or for works undertaken by the Commissioners of the municipality for the benefit of the town.

29. The Commissioners shall point out a piece of ground for a burial-ground, &c. The Commissioners shall also have the right of granting portions of the said burial-ground to such persons as may apply for such, to be by them used as their private cemetery, &c.

After argument,

De Villiers, C.J.: It is common cause that the plaintiffs stand in the place of the original vendors of the land in question. They are therefore entitled to the benefit of the conditions upon which the lots were sold unless something has since occurred which in law is sufficient to deprive them of such benefit. The defendants who constitute the municipality of the township which had been sold in lots by the original vendors rely upon the act constituting the municipality, the municipal regulations, and the actual usage of the municipality and erfholders since the establishment of the village as sufficient to deprive the plaintiffs of the rights now claimed by them. In regard to the Municipal Act any conditions which are inconsistent with it must be held to have been revoked from the time when the township was placed under the operation of the Act. For instance one of the conditions is that no local taxes of any description shall be levied upon any erven which shall remain unsold. But the 115th section of Act 45 of 1882, the Act under which the present municipality was established, enacts that all land within any municipality shall be ratable with certain exceptions. Unsold erven are not enumerated among the exceptions, and are therefore liable to be rated notwithstanding the conditions. But conditions which are not repugnant to the Act cannot be overridden by municipal regulations. The power of framing regulations must be exercised with due regard to private rights of ownership. Among the purposes for which regulations may be made is that of granting licences for the making of bricks or for digging or removing gravel or clay or for quarrying stone and to prescribe the fees (if any) to be paid for the same. Any regulation thus made can only apply to land in respect of which the municipality has a right of control over the making of bricks, the digging of clay or gravel, or the quarrying of stones. The 10th condition of sale expressly stipulated that these acts should not be done on the village lands without the consent of the vendors. Clearly therefore the consent of the plaintiffs is necessary before the defendants can authorise the digging of clay or stone in any fresh pit or quarry. But then it is said that because the Commissioners have since 1863 done such acts as are now complained of, they have acquired a right by prescription to do the same. There is only one quarry as to which there is any evidence that it has been used as far back as thirty years ago, but the right claimed by the defendants is not to grant permits in respect of that particular quarry but over the whole of the commonage. Obviously such a claim is not to be reconciled with the strict limitations placed by the law upon the acquisition of rights by prescription. In regard to the erection of buildings the matter is not referred to in the conditions, nor is any authority given to the defendants by the Municipal Act to erect buildings on the property of others without compensation in terms of the 158th and 177th sections. The Court will declare that the defendants are not entitled to dig gravel, quarry stone, or make and burn bricks upon any part of the commonage or village lands, or to grant permits to others for such purposes save with the permission of the plaintiffs, and at the spots pointed out by them, or to erect permanent pens or buildings save in pursuance of the powers vested in them by virtue of sections 158 and 177 of Act 45 of 1882. The defendants must pay the costs of suit.

Maasdorp and Solomon, J.J., concurred.

[Plaintiff's Attorneys, Messrs. Walker & Jacobsohn; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice SOLOMON.]

ROBINSON V. CARTER AND ARMSTRONG. 1898. Nov. 22nd.

In this action, which is one for rescission of contract, the defendants, who had been barred from pleading, applied for leave to plead and also for the case to be set down for trial by a jury.

Sir Henry Juta, Q.C. (with whom was Mr. Currey), appeared for the applicants.

Mr. Innes, Q,C. (with whom was Mr. Searle, Q.C.), appeared for the respondent (the plaintiff in the action).

In his affidavit, the respondent's attorney agreed to the defendants being allowed to plead, but opposed the trial of the case by a jury. It was stated that Mr. Robinson intended leaving for England early next month, and it was therefore urged that the case should be heard as soon as possible, as his witnesses might leave the country or be lost sight of if the case were delayed too long. In addition it was stated that one of his material witnesses was in a delicate state of health.

After argument,

De Villiers, C.J., said: If a trial by jury is decided on it will be impossible to hear the case before December 7. Under all the circumstances I am of opinion that the defendants should be allowed to plead, and as they have desired that the case should be tried by a jury, I am of opinion that the Court should allow it. It is essentially a jury case, being a question of the credibility of witnesses, and it will certainly be a relief to the Court to have the case tried by a jury. One of the judges will be prepared to sit on the case if it is brought on on December 7, but if the parties could postpone the case till some time next term it would certainly be more convenient to the Court. That might be taken into consideration, and in the meantime the case will be set down for December 7.

Mr. Innes applied that the evidence of one of plaintiff's witnesses, Benjamin Reid, who is proceeding to England by this week's mail steamer, be taken by commission.

The Court granted the application, Mr. Buchanan being appointed commissioner.

HAARHOFF AND OTHERS v. SMITH AND GERBER. } 1898. Nov. 22nd.

Sale—Cancellation.

This was an action instituted by Messrs. D. J. Haarhoff, J. J. Michau, D. P. Maritz, and W. P. Wolhuter, of Kimberley, against H. W. Smith, of Willowmore, and P. M. Gerber, of Sterkstroom, Orange Free State.

The declaration alleged as follows: That on or about March 23, 1895, the defendants purchased from one A. J. Viljoen certain four farms in the district of Hay, viz., Vaalwater, Kopje, Dell, and Range.

It was a condition of the said purchase that the defendants should, in addition to the payment of the purchase price, take over and discharge the balance due on the three last-mentioned of these farms to the Colonial Government, viz., £236 5s., being the amount required for the purpose of redeeming the quitrents on the said farms, which were originally purchased from the said Government in terms of Act No. 14 of 1878.

Thereafter, in or about the month of November, 1896, the plaintiffs purchased the said farms from the defendants, and paid the purchase price thereof, viz., £5,000, one of the conditions of the said sale and purchase being that the said properties were to be free from any encumbrances whatever, and especially from the liability referred to in the last paragraph.

The plaintiffs have taken transfer, but the defendants have neglected and refused to pay the said amount of £236 5s.

By reason of the defendants' neglect and refusal the plaintiffs have sustained damages in £250.

The plaintiffs claimed the said sums of £236 5s. and £250.

The plea admitted that the defendants agreed with Viljoen to pay any balance which might be owing by him to the Government upon the farms, but they said that no sum was, in fact, at the time due in respect of them.

That on or about 26th September, 1895, they sold the farms through one Maritz, who was then acting as their agent, to the plaintiff Wolhuter for £5,000; that Wolhuter purported to act "on behalf of a syndicate about to be formed." The defendants referred the Court to such proof as the plaintiffs might adduce as to whether such a syndicate was ever formed, or whether the plaintiffs comprise the members of it. No reference was made in the said contract of sale to any liability to the Government in respect of the farms.

That the purchase price of £5,000 was paid to Wolhuter, and that the only contract of sale entered into by them with regard to the said farms was the sale to Wolhuter referred to.

In the replication the plaintiffs admitted the sale to Wolhuter referred to, but said that thereafter the defendants repudiated the said agreement, by which *inter alia* the purchase price was not payable until twelve months after the 26th September, 1895.

They said that thereafter litigation ensued between the defendants, as plaintiffs, and Wolhuter, in the High Court at Kimberley, but that the defendants, in November, 1896, agreed to sell the said farms to the plaintiffs, which is the purchase referred to in the declaration, and upon the terms of which this action was founded.

Issue was joined upon these pleadings.

Mr. Searle, Q.C., and Mr. Upington appeared for the plaintiff.

Mr. Innes, Q.C., and Sir H. Juta, Q.C., for the defendants.

John Johan Michau, an attorney and member of the firm of Haarhoff & Michau, practising at Kimberley, stated that he, with the co-plaintiffs, entered into the agreement on November 26, 1896, for the purchase of four farms from the defendants for the sum of £5,000. The first connection witness had with these farms was in March, 1895, when the present defendants bought them from the previous owner, Viljoen. One of the plaintiffs, D. J. Maritz, was then acting for Viljoen, and on his instructions witness drew up the "koop brief," which made provision for the paying off by the purchasers of all encumbrances on the farms. In September, 1895, Wolhuter, one of the plaintiffs, came to witness, and he drew up a deed of sale of these farms between Maritz, who was acting for the defendants, and Wolhuter. That was done on behalf of a syndicate about to be formed. Witness asked Maritz if the defendants had paid the quitrent, according to their agreement with Viljoen. Maritz replied that they had assured him that they had done so Maritz showed witness his power to sell the farm. Some time afterwards Maritz showed witness a copy of a letter he had sent to Smith and Gerber with regard to the cancellation of the sale, owing to a dispute as to his having exceeded the powers granted to him under his power to sell. In September, 1896, however, the defendants sued Wolhuter under the "koop brief," they having refused to recognise the cancellation of the contract. The case came before the High Court of Griqualand West on exceptions taken by Wolhuter which were overruled. On November 24, witness met the defendants at Maritz's place of business, and they agreed to accept the plaintiffs as the purchasers in place of Wolhuter. Gerber said he would not mind so long as he got his £5,000. Both the defendants were satisfied with the arrangement. Witness knowing about the agreement to redeem the quitrent, asked the defendants if they had done so, and Gerber said that they had, while Smith said that he owed the Government nothing. Witness detailed the subsequent negotiations, which ended in plaintiffs receiving the purchase money for the farms, although they had not redeemed the quitrent. In January witness was in Cape Town and met Gerber, and the latter then admitted that the £236 5s. was due. Afterwards defendants repudiated their liability, and the present action was brought.

Cross-examined: The arrangement by which the property was transferred to the syndicate was not made so as to enable them to escape paying double transfer duty. The sale on November 24, 1896, was a completely new sale, notwithstanding that interest for two months was paid upon the capital sum.

Re-examined: When witness spoke to the defendants about the payment of the quitrent they understood perfectly what he was referring to.

Daniel Jacobus Maritz, an auctioneer carrying on business in Kimberley, one of the plaintiffs in the suit, and the registered owner of one-third of the farms in dispute, deposed to the sale of the farms through him to defendants, Viljoen being the vendor. It was then clearly explained to defendants both by Viljoen and witness, that £200 had to be paid to Government to capitalise the quitrent and make the farms perfectly free. It was on condition that that was paid that the farms were sold to defendants. Afterwards, the defendants gave witness a power of attorney to sell the farms, and said that the quitrent had been paid off so that he could sell the farms as freehold property. Accordingly when witness sold the farms to Wolhuter he told him it was freehold property. Afterwards, in January, 1896, witness went to Humansdorp to buy mules, and while there saw the defendants, and explained to them that Wolhuter had said he would not be able to pay for the farms when the money became due. Defendants then said that it did not matter, as witness would be held liable, he having no right to sell the farms on twelve months' credit. Smith said that if it was in the power of attorney it must have been put there without their instructions. Witness thereupon wrote the letter, saying he had cancelled the sale. On November 24 he was present at an interview with the defendants and Mr. Michau. He corroborated the evidence of Mr. Michau, who then explained that they would become purchasers with Wolhuter. Defendants agreed, and also stated that the farms were now freehold, the quitrent having been capitalised. Subsequent transactions were conducted by Mr. Michau.

Cross-examined: Witness looked upon the properties as freehold, although in the power of attorney which he had drawn up he had said that the sale was subject to Government and other rates. All the gold-bearing syndicates which had then been formed for prospecting round about that district went down about January, 1896.

Willem Johannes Wolhuter, residing at Kimberley, deposed that in September, 1895, Mr. Maritz, on behalf of the defendants, came to witness and offered him these farms for sale. Witness make some inquiries, and

Maritz told him there was a bond on the property. He also said he would sell it as a freehold property, and said there was an amount due on the property to Government when the defendants bought it from Viljoen, but that defendants had assured him that that had been paid off. Witness intended to form a syndicate, but though the prospectus was issued the syndicate did not go through. Afterwards witness was sued in the High Court, and he raised exceptions on the ground that he was acting for a syndicate which had not been formed, and secondly, that the sale had been cancelled. Judgment was given against witness on the exceptions, and then negotiations were entered into for a settlement. Witness had not got the money to pay the £5,000, and so he got the other plaintiffs to join with him. Mr. Michau saw defendants, and after arrangements had been made for the purchase Mr. Michau asked if the quitrent had been paid off. Gerber said it had, and Smith said he owed Government nothing. That was on November 24. On another occasion Gerber had in witness's presence stated that the quitrent had been paid off. Witness concluded after that that the matter of the purchase had been fully settled.

Cross-examined: By the word "vendors" in the prospectus issued by the witness in November, 1895, witness did not mean the plaintiffs in this action. He could not explain how that word was there. That gold prospect turned out to be all a mistake. About three months after the purchase of the farm, in January, 1896, the bubble burst, and the farms were not worth £5,000. Witness said he could not pay, and as the defendants were going to hold Maritz responsible, the latter wrote to witness cancelling the sale. Witness could not remember saying to Gerber that it was not because he had no money that he did not pay at once, but because the deed of sale allowed him twelve months, nor could he remember offering to pay £4,500 at once if they would accept that.

Mr. Innes asked for absolution from the instance.

After argument,

De Villiers, C.J., said: It is common cause in the present case that the defendants sold the farm in question to Wolhuter for the sum of £5,000, the sale taking place through the agency of Maritz, who held a formal, but special power of attorney authorising him to make the sale, and stating the terms upon which the sale could take place. Nothing could be more formal than the manner in which the whole thing was done. Maritz, acting upon that special power, sold the property to Wolhuter, and he at once informed the defendants of the sale. The defendants raised no objections and it is clearly therefore a case in which silence means consent. It is stated now by Maritz that he is not sure whether Smith received his letter informing him of that sale, but he admits that Gerber knew, and there can be no doubt but that both defendants knew the sale had taken place on their behalf. After some time, however, it was found that the farm did not promise to be so gold-producing as was originally expected, and no doubt Wolhuter was very anxious to get out of the sale. I do not think it is necessary to inquire into Maritz's reason for going to Humansdorp—he says it was for the purpose of purchasing mules, but at all events it gave him a convenient opportunity of seeing the defendants, and having a conversation with them. After that Maritz sent the defendants the letter which has been read, in which he explained what had passed at that meeting, but the defendants at once denied that any such conversation took place. Maritz, however, acting as he says for Gerber and Smith, thereupon cancelled or purported to cancel the sale, and from that time forward an attempt was made by Wolhuter to prove that there was no sale at all. The matter came before the High Court, and certain technical exceptions were taken by Wolhuter. These exceptions were disallowed, and no further proceedings were taken. A correspondence took place between the parties on the subject, and this correspondence is all headed as being in the suit between the present defendants and Wolhuter. Now, as far as the original documents are concerned there can be no doubt that Wolhuter alone was the purchaser. Then Mr. Michau says that on November 24 he had a conversation with the defendants, and during the course of that conversation it was practically agreed that the sale to Wolhuter should be cancelled, and that the present plaintiffs should step into his shoes and become the purchasers of the farms. The Court cannot lose sight of the fact that Mr. Michau is an attorney of this Court, and presumably well acquainted with the law, and I am quite satisfied that if it had been intended that the sale to Wolhuter should be cancelled, a gentleman of Mr. Michau's experience would undoubtedly have acted according to the provisions of the law, and seen that the due declarations were made in terms of the Transfer Duty Act. No doubt also he would have then seen that the previous contract was cancelled, and would also have had a fresh contract put in its place, and that that contract was made out formally and correctly. Nothing of that kind has been done in this case, and now the Court is asked on this conversation to hold that the sale had been cancelled without any declaration having been made in terms of the Act, and without any fresh contract in writing. In my opinion that would be contrary to the principles on which the Court has acted in cases of this kind. The Court has always held that here, where there is no Statute of Fraud, they would require the clearest evidence of the sale or contract. In the present case we have the clear evidence in writing of the sale to Wolhuter, with no such evidence of the cancellation in November, and no declaration in terms of theTransfer Duty Act. Under these circumstances it is impossible for the Court to hold that there was a cancellation of the contract and that a fresh contract was entered into, as the plaintiffs now say. Therefore the present declaration falls to the ground, and the plaintiffs cannot succeed. Moreover, it was said that one of the conditions was that the defendants should give the farms free from quitrent, but this part of the evidence is very doubtful. Taking, however, the statements made by Mr. Michau, even if these statements are perfectly correet, and it seems to me he gave his evidence fairly, there is nothing to show that Smith, at all events, took this view. It was stated that he said he owed the Government nothing, and it was quite true that he owed the Government nothing so long as he paid his annual quitrent. Therefore, even if Smith said that he owed the Government nothing, that could not be held to be such misrepresentation as to justify the plaintiffs in obtaining damages. Mr. Michau further said that he met Gerber in Cape Town, and the latter then admitted his liability. Well, if he made that admission there might be some way of obtaining a case against him, but certainly not on the present action. Without hearing the evidence for the defence, I am of opinion that the defendants are entitled to absolution from the instance with costs.

Maasdorp and Solomon, J.J., concurred.

[Plaintiffs' Attorneys, Messrs Van Zyl & Buissinné; Defendants' Attorneys, Messrs. Walker & Jacobsohn.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hons. Mr. Justice MAASDORP and Mr. Justice SOLOMON.]

SALISBURY REEF GOLD-MINING COMPANY V. BRITISH SOUTH AFRICA COMPANY. — 1898. Nov. 23rd.

Trial by jury—Matabeleland Order in Council—Introduction of law—Abrogation by disuse.

Section 26 of the Matabeleland Order in Council of 1894 introduces into that country the law of the Cape Colony "as nearly as the circumstances of the country permit."

Held *that the circumstances of the country at the date of the Order in Council must be looked to, and that consequently, even if trial by jury in civil cases became practicable with the subsequent development of the country, it cannot be held to have been introduced by the Order in Council if impracticable at the date of such order.*

Semble: *If the law relating to trial by jury had been introduced by the Order in Council the fact that the law was never observed for four years would not prove that it had been abrogated by disuse.*

This was an appeal against a decision of Mr. Justice Watermeyer in the High Court of Matabeleland upon the application by the plaintiffs (now appellants) for a day to be fixed on which the judge would sit in chambers to settle the issues to be submitted to a jury in accordance with Act 7 of 1854 and Act 30 of 1874, Mr. Justice Watermeyer, in giving judgment, said: Mr. Murphy has urged that the original settlers brought with them their laws as far as applicable. It might be matter for argument whether trial by jury was applicable to the conditions of the original settlement, and if so, whether English or Cape procedure should prevail But our law is settled by the Matabeleland Order in Council of 1894. Section 26 of that Order introduces the law of the Cape Colony "as nearly as the circumstances of the country permit" . . . "except so far as that law has been modified by any Order in Council, or Proclamation or Ordinance in force at the date" thereof, and further enjoins the Court to "give effect to . . . any Order in Council, Proclamation, Ordinance or regulation hereafter to be made." The High Commissioner's Proclamation of June 10, 1891, remained unrepealed, and therefore it has been held, under section 19 of that proclamation, that no statute of the Colonial Legislature promulgated after that date applies in this country. This introduction of the Cape law *en bloc* seems to me in some way analogous to the establishment of the Dutch law in the Cape Colony "as far as applicable," as pointed out by the Chief Justice in the case of *Seaville* v. *Colley* (9 J. 39). Following, then, the words of the Chief Justice at p. 44 of the report, it would appear that the presumption is that every law in force in the Colony on June 10, 1891, is in force in this country, unless it can be shown that the circumstances of the country do not permit, or that it has been modified by any existing local legislation, or in any way repealed or abrogated. Considering whether "the circumstances of the country permit," I confess I see a great difficulty in applying the provisions of Act 7, 1854, to the constitution of this Court. Section 8 provides for a review by the Supreme Court of any decision of a judge in chambers in fixing the issues. Who is to exercise that power in this country? Mr. Murphy suggests the Supreme Court in Cape Town. But under the present constitution the Supreme Court has only power to deal with the decisions of this Court when the amount involved exceeds £100. The Supreme Court is constituted the Court of Appeal from our High Court. I do not know if they would consent to review the decisions of a judge of this Court sitting in chambers to fix issues for a jury. The same remarks practically apply to section 36 of the Act. The alternative suggestion that the two judges of this Court should meet to review the decision of one of themselves is impracticable in the present circumstances of the country. Practically if trial by jury in civil cases is to exist here it must be without the limitations imposed by sections 8 and 36 of the Act. But the next difficulty is, where is the jury to be obtained from? I pass over Mr. Castens' objection that there are not sufficient jurymen in the town. I think that the requisite number could be found, but certainly the choice would be limited, and with the present population it is probable that the same men would be summoned to every jury sitting. But the selection of a jury for a civil trial under Act 7 of 1854 as amended by Act 30 of 1874 depends upon the existence of a jury list for criminal cases. Admittedly no such list exists at present, but Mr. Murphy contends that it is the duty of the Government to see that such a list is framed. But since the establishment of this Court in 1894 there never has been a trial by jury in a criminal case. I do not know if the matter has ever been argued, but certainly it seems to have been heretofore assumed that the right of trial by jury in criminal cases did not exist. The Court has always acted on this assumption. I presume that it was the result of the interpretation then placed on section 31 of the Order in Council. The practice has been recognised by legislation providing for assessors in criminal cases—see the High Commissioner's Proclamation of July 23, 1895. The Proclamation seems to me quite inconsistent with a right of trial by jury in criminal cases. Sentences passed by the judges of this Court sitting alone or with assessors, have been confirmed by Her Majesty's High Commissioner, and the objection has never been taken that these cases should have been tried by a jury. In my opinion, the right of trial by jury in criminal cases, if it ever existed in this country, has, if not actually repealed by the above-mentioned Proclamation of July, 1895, been tacitly repealed. Referring again to the case of *Seaville* v. *Colley*, I find that the practice of trial by jury in criminal cases, if it ever existed, has become inconsistent with the usages of this country, and has therefore been abrogated by disuse. If an application for trial by jury had been made on the original establishment of this Court, there might have been more foundation for Mr. Murphy's argument. But the established practice of the Court and the abovementioned proclamation of July, 1895, have made it too late to re-open the question now as far as criminal trials are concerned. But if trial by jury in criminal cases does not exist, there is no jury list for criminal cases, and therefore no list from which a jury for civil cases can be drawn,, in other words there is no machinery in existence for applying the Jury Acts of 1854 and 1874. But I am prepared to go further than this, and to hold section 31 of the Matabeleland Order in Council was intended to exclude juries "until other arrangements are made by Proclamation." The language used is not as clear as it might be, but I am satisfied that was the intention of the section, and certainly that interpretation must have been put upon it when the Proclamation of July, 1895, above referred to, was issued. I am therefore of opinion that the plaintiff has no right to claim a trial by jury in this case, and cannot therefore accede to Mr. Murphy's application to fix the issues in chambers. The defendant must have his costs of appearance.

Sir H. Juta, Q.C., and Mr. Benjamin for the appellants.

Mr. Innes, Q.C.. and Mr. Graham, Q.C., for the respondents.

The following statutory enactments were referred to in the argument and judgments:

High Commissioner's Proclamation, 10th June, 1891.

Section 3. Every Resident Commissioner is hereby empowered and authorised to hold a court and to exercise jurisdiction in and adjudicate upon all causes, suits and actions whatsoever, civil or criminal, within the said territory assigned to him, such court to be holden at such places within the said territory as the said Resident Commissioner may from time to time appoint.

Section 19. Subject to the foregoing provision of this proclamation, in all suits, actions or proceedings, civil or criminal, the law to be administered shall, as nearly as the circumstances of the country will permit, be the same as the law for the time being in force in the Colony of the Cape of Good Hope: Provided, that no Act passed after this date by the Parliament of the Colony of the Cape of Good Hope shall be deemed to apply to the said territory.

Matabeleland Order in Council, 18th July, 1894.

Section 26. There shall be a Court of Record, styled the High Court of Matabeleland, with full jurisdiction, civil or criminal. over all persons and over all matters within the limits of this order, and the law to be administered by the High Court and by the Magistrates' Courts hereinafter mentioned, shall, as nearly as the circumstances of the country permit, be the same as the law in force in the Colony at the commencement of this order, except so far as the law has been modified by any Order in Council or Proclamation, or Ordinance in force at the date of such commencement.

Section 31. The High Court shall be held at such places as may from time to time be prescribed by Proclamation or Ordinance. The jurisdiction of the High Court may, until other arrangements are made. by Proclamation, be exercised by any Judge thereof sitting alone.

Proclamation, 23rd July, 1895.

Section 2. It shall be lawful for the Judge of the High Court of Matabeleland to call in and appoint two or four assessors, being either natives or persons of European birth or descent, to aid him in the decision of any criminal case in such court, and such assessors with the Judge shall then be deemed for the purpose of hearing and deciding such case to constitute this court, the judgment whereof shall, however, be the judgment of the Judge, who shall consult such assessors and duly record any dissent on the part of any of them from his judgment.

Sir H Juta: The British South Africa Company's Charter was granted in December, 1889, and the first legislative Act was passed in June. 1891. The people who settled in the country during that time brought with them the law of England and included in that was the right of trial by jury. *Seaville* v. *Colley* (9 Juta, p. 39) was misunderstood by the learned judge below, for the usage referred to there was long established usage. By the Proclamation of 1891, the law of the Colony as it stood in 1891 was incorporated.

Then the Order in Council of 1894 enacted that the law of the Colony as it existed at that date should be the law of Rhodesia, except so far as modified, &c. The Jury Act of 1891 was not excluded, and moreover that Act does not require a list of jurors for criminal cases. There has been no modification of the law as regards jury trial. There is no difficulty about the fixing of issues; as to review that may be done by the High Court itself. Section 31 of the Order in Council says that the jurisdiction of the High Court may be exercised by one judge sitting alone until other arrangements can be made, that is, until other judges are appointed. This was not intended to alter the whole criminal procedure and do away with the necessity for a jury. but it was necessary because otherwise two judges would be required. *Charter of Justice.* The object of calling in assessors is not to constitute them a jury, the decision is the decision of the judge.

[De Villiers, C.J.: If you are correct, then in criminal cases there should be trial by jury?]

Certainly.

[De Villiers, C.J.: Then all previous trials have been illegal?]

Not if they have submitted to a trial by judge alone.

[De Villiers, C.J: In criminal cases rights can not be surrendered.]

It may be so in the case of a new country peopled by settlers, who can claim the law which is brought in with them.

It is for the respondents to show that the law which was clearly introduced by these settlers on their arrival has been abrogated. The difficulties which have been pointed out disappear when it is considered that Act 23 of 1891 repeals Act 7 of 1854.

[Maasdorp, J.: Section 3 of the Proclamation of 10th June, 1891, gives jurisdiction to a Resident Commissioner without a jury.]

That does not take away the right to a jury. In 1894, moreover, by the incorporation of the Colonial law trial by jury has been again introduced. Although grand juries have been abolished in the Colony the qualification still remains.

[De Villiers, C.J.: Mr Innes, do you say that if Act 23 of 1891 is applicable to the circumstances of the country it does not apply?]

It does not apply. That is the view taken there also. The Companies Act of 1892 and the Liquor Act of 1891 have been re-enacted in Rhodesia.

De Villiers, C.J.: I wish to observe at once that while agreeing with the judgment of the learned judge in the Court below, I cannot quite adopt his view as to the far-reaching effect of the decision of this Court in *Seaville* v. *Colley* (9 Juta, 39). Referring to that case he said: "I find that the practice of trial by jury in criminal cases, if it ever existed, has become inconsistent with the usages of this country and has therefore been abrogated by disuse." Considering that only eight years have elapsed since the date of the first Order in Council it would be difficult to hold that there has been such a well-established custom as would be sufficient to abrogate a law once in force. In my opinion, however, the law relating to trial by jury in civil cases never was in force in Rhodesia. The fact that there has never been a trial by jury either in civil or criminal cases, although not sufficient to abrogate the law if once introduced, goes far to prove that the circumstances of the country were considered not to admit of its introduction. The learned judge held that Acts passed in this colony between 1891 and 1894 are not in force in Rhodesia but it is unnecessary for the purpose of this case to decide the point. Whichever date is taken, I am of opinion that the Jury Act in force in this colony at such date was not applicable there and then. It was not until 1854 that it was deemed expedient to introduce trial by jury in civil cases into this colony, although the Charter of Justice had been in operation for over twenty years. Even then it was confined to the Supreme Court, and it was not until 1891 that it was allowed in the Eastern Districts Court or in the High Court of Griqualand. Even now there can be no trial by jury in civil cases in the Circuit Courts of this colony. It is not surprising, therefore, that the learned judge found it difficult to hold that the circumstances of Rhodesia would admit of the introduction of trial by jury in civil cases. The difficulty must have been still greater, in fact it must have been insuperable, in 1891, or even in 1894. It is quite possible that with the development of the country since these dates the objection no longer exists, but in order to decide whether the Colonial Statutes relating to trials by jury were introduced at all we can only consider the state of the country at the date of the Order in Council which is in question. On this point we have no personal knowledge, but we are not debarred from making use of such knowledge as we possess relating to the recent history of South Africa. We are also entitled, nay, bound, to attach the greatest weight to the opinion of the learned judge, who has the required personal knowledge of the conditions of the country in which he administers justice. The appeal must be dismissed with costs.

Maasdorp and Solomon, J.J., concurred.

[Appellants' Attorneys, Messrs. Van Zyl & Buissinné; Respondents' Attorneys, Messrs. Scanlen & Syfret.]

BRITISH SOUTH AFRICA COMPANY V. SALISBURY REEF GOLD-MINING COMPANY. 1898. Nov. 23rd.

Charter—British South Africa Company—Duty imposed by statute or charter — Non-feasance — Damages.

The 10th clause of the Company's Charter directs that "the Company shall to the best of its ability preserve peace and order in such ways and manners as it shall consider necessary."

Held, on appeal, *that a declaration alleging that in 1896 the natives rose, that the plaintiffs' property was destroyed in consequence of the rising, and that the plaintiffs did not receive from the Company the protection which the Company was bound to afford them under the Charter, does not disclose a cause of action.*

This was an appeal from a decision of Mr. Justice Watermeyer, in the High Court of Matabeleland, upon an exception to a declaration filed by the plaintiff (now respondent). The declaration was as follows:

1. The plaintiff is the Salisbury Reef Goldmining Company (Limited), a company duly incorporated under the Companies Acts, 1862 to 1893 (England), having its head office in London, and an office in Salisbury, Rhodesia. The defendant is the British South Africa Company, a company incorporated by Royal Charter, the governing power in these territories, trading and having an office in Salisbury aforesaid.

2. Prior to June, 1896, the plaintiff acquired certain mining claims at present registered in his name, situate in the district of Salisbury aforesaid.

3. The plaintiff erected certain buildings, mining plant, machinery, and other mining requisites on the said claims, more particularly specified in the schedule marked A annexed hereto, which he prays may be considered as inserted therein. The aforesaid property cost the plaintiff the sum of £6,000.

4. In or about June, 1896, the native inhabitants of Rhodesia rose against and made war upon the defendant.

5. The plaintiff's aforesaid property was destroyed during, and in consequence of, the said rising, and the plaintiff thereby sustained a loss of £6,000.

6. During the aforesaid rising the plaintiff did not receive from the defendant the protection which the defendant was bound to afford him under and by virtue of the aforesaid Charter, and by reason of such default is entitled to demand from the defendant the aforesaid sum of £6,000.

Wherefore the plaintiff claims: (1) The sum of £6,000, as for compensation or damages for and in respect of the injuries sustained as aforesaid; (2) such other alternative relief as this Honourable Court may direct.

The defendant excepted to the declaration on the ground that it disclosed no cause of action, and was in that respect and otherwise insufficient, embarrassing, and bad in law. The exception was overruled.

Mr. Justice Watermeyer said: The declaration in this case is rather loosely drafted, and I take its meaning to be this: That a statutory duty is imposed on the British South Africa Company to protect the property of settlers—that the company have neglected this duty, and that the plaintiff has thereby suffered loss. An exception has been filed that no cause of action is disclosed. Practically it was argued as a legal plea that no such statutory duty as mentioned existed. In order to sustain the exception at the present stage I should have to find that in no case can the British South Africa Company be called on to protect the property of settlers in this country. In my opinion the Charter imposes on the British South Africa Company a statutory duty to maintain some sort of civilised government, and that involves some protection to life and property. The nature of the Government and the degree of protection are questions of detail which must be the subject of evidence in any particular case. Section 10 of the Charter says: "The company shall to the best of its ability preserve peace and order. The remainder of the section is so worded as to allow the company an ample discretion as to the methods to be employed for preserving peace and order, but the first part which I have quoted is imperative. Mr. Castens relied in his argument on three cases: *Hay* v. *the Divisional Council of King William's Town* (1 E.D., 97); *Rubidge* v. *Hadley* (2 M. 174); *Nicholls* v. *Marsland* (2 Ex. Div., 1). But I cannot see that any of these cases assist him at the present stage. All that those cases establish is that the facts proved in each of them amounted to *vis major*. But in each of those cases the defence was taken by way of plea, not exception, and the *vis major* was proved by evidence. *Nicholls* v. *Marsland* depended primarily on the finding of a jury, that the defendant had not been guilty of negligence. In *Hay's* case, Smith, J., quoted from a judgment of Sir William Scott to the effect that a defendant must show by evidence that he has done all that could reasonably be expected of him to carry out his statutory duty. In *Rubidge* v. *Hadley* the Court took evidence as to the possibility of occupying the farm. Mr. Castens further argued that plaintiff does not allege that he asked for protection, but if there is anything in that it should be a matter of plea. Plaintiff alleges that he did not receive the protection he was entitled to. If there was a condition precedent to his obtaining protection it should be pleaded. The last argument advanced by Mr. Castens was that no action lies at the suit of a private individual against the British South Africa Company for neglect of any duty imposed by the Charter because the Crown has reserved the right of revoking the Charter if the company fail to observe its provisions. I cannot agree with that argument. I look on the Charter as in the nature of a statute imposing statutory obligations, and for the neglect of a statutory obligation a suit has always lain at the instance of any private person who may have suffered as the direct result of such neglect. In my opinion it is impossible to decide the case on this exception. Defendant should plead that he has done all that he was compelled to do, and that the injuries to plaintiff's property occurred through causes beyond his (the defendant's) control, and support this plea by evidence. At present the plaintiff is entitled, on his declaration, to proceed to trial and adduce his evidence. The exception is disallowed, with costs.

The defendant appealed.

Mr. Innes, Q.C. (with him Mr. Graham, Q.C.), for the appellant.

The foundation of the action is the allegation that the plaintiff did not receive from the company the protection which it was bound to afford him under the charter. The only section which the plaintiff can refer to is the 10th, viz.: "The company shall to the best of its ability preserve peace and order in such ways and manners as it shall consider necessary, and may with that object make ordinances (to be approved by our Secretary of State) and may establish and maintain a force of police." The learned judge in the Court below practically imposed on the company a statutory duty to afford protection. I submit that the section leaves it to the discretion of the company as to the way in which it shall preserve peace and order. The sanction is the exercise by the Crown of the power of revoking the charter contained in section 35. Section 10 only indicates the course to be pursued by the company.

[Maasdorp, J. referred to section 3: "The company is hereby authorised and empowered . . . to acquire by any concession . . all or any rights, interests . . and powers of any kind or nature whatsoever, including powers necessary for the purposes of government and the preservation of public order in or for the protection of territories, lands or property comprised, &c.]

That only empowered the company to obtain rights, &c. If it employed no police force at all representations might be made to Her Majesty and the charter withdrawn, but it gives no individual a legal right Section 31 provides that the charter shall be construed in the sense most favourable to the company.

[Maasdorp, J.: Order in Council, May 9, 1891, section 4, declares that the High Commissioner may "provide for the administration of justice and generally for the peace, order and good government of all persons, including the prohibition and punishment of acts tending to disturb the public peace."]

That is also discretionary.

[De Villiers, C.J., referred to *Jordaan* v. *Worcester Municipality* (3 Sheil, 195 — 10 Juta, p. 159).]

There is also the case of *Haarhoff's Trustee* v. *Frielsich* (4 Sheil, 352—11 S.C.R., p. 339).

Sir H. Juta, Q.C. (with him Mr. Benjamin) for the respondent: It is a fallacy to treat the company as the *Princeps* whereas it is a creature of statute having certain rights and duties. Section 10 creates a clear duty. A municipality which has a duty imposed upon it is liable for not doing that duty. The company is in the same position as any public body, and it is for it to show that it has done its duty to the best of its ability.

[Solomon, J.: If an action lay under these circumstances against the company would it not lie against any Government?]

No, because the *Princeps* can do no wrong; but the company is not a *Princeps*.

De Villiers, C.J.: I am clearly of opinion that the declaration, as it stands, discloses no cause of action. It is not necessary to enter into the wide question which has been introduced into the arguments whether the legal status of the defendant company is that of an ordinary company or that of a Government. Taking the view most adverse to the company that it must be treated as merely the creature of the Charter and as not invested with the ordinary attributes of a Government, the judgment of the Court below cannot be supported. In the case of *Jordaan* v. *Worcester Municipality* (10 Juta, 159) it was held that where a legal duty is imposed upon and undertaken by a public body or individual, and no other remedy is provided in case of non-performance, a person who, without contributory negligence, sustains damage by reason of such non-performance is entitled to recover in the absence of proof that the duty was impossible of fulfilment. It was pointed out, however, that the duty must be clear and must have been expressly imposed. What then is the clear legal duty relied upon in the present case as having been expressly imposed upon the defendant company? The 10th clause of the Charter provides that "the company shall to the best of its ability preserve peace and order in such ways and manners as it shall consider necessary, and may with that object make ordinances to be approved of by our Secretary of State and may establish and maintain a force of police." There is no allegation in the declaration that the company has not to the best of its ability maintained peace and order, but there is an allegation that the plaintiffs did not during a native rising receive from the company the protection which it was bound to afford to them under the Charter. The statement that the plaintiffs did not receive such protection is quite consistent with the company having to the best of its ability preserved peace and order in the territory. The declaration contains no averment of any clear legal duty or of a definite breach of duty, and is altogether too vague to support a claim for damages. It is by no means clear that the 10th clause of the Charter does impose on the company a definite duty for the non-performance of which it would be legally liable or that, if it did, the damages claimed would not be too remote, but these points do not now arise for determination. For the reasons already stated the ppeal must be allowed, with costs in this Court, and the exception must be allowed, with costs in the Court below.

Maasdorp and Solomon, J.J., concurred.

[Appellants' Attorneys, Messrs. Scanlen & Syfret; Respondents' Attorneys, Messrs. Van Zyl & Buissinné.]

[Before the Hons. Mr. Justice MAASDORP and Mr. Justice SOLOMON.]

ROWLAND'S TRUSTEES v. OHLSSON'S CAPE BREWERIES. { 1898. Nov. 23rd.

Undue preference—Ordinary course of business—Sale of goodwill by lessee of public-house—Payment to landlord.

This was an action for the payment of £298 5s. 5d. on the ground of an undue preference.

The declaration alleged that the estate of G. G. Rowland was surrendered on the 28th April, 1898, and that the defendant was on the 11th March, 1898, a creditor of the said Rowland in the sum of £298 5s. 5d.; that on that day his liabilities at the time exceeding his assets and the sequestration of his estate being contemplated by him he paid the said sum of £298 5s. 5d. to the defendant company, and thus unduly preferred them before his other creditors.

The plea was to the following effect:

The defendants admit that the said Rowland paid them the sum of £298 5s. 5d. on the 11th of March, 1898.

On the said 11th of March the said Rowland was a lessee of the defendants of a certain public-house under a written lease, copy of which is hereunto annexed. By the said lease the tenancy was terminable at any time by the defendants upon written notice, and the tenant, the said Rowland, could not assign or sub-let, or in any way alienate or part with any of his interest in the premises leased to him without the written consent of the defendants. The said Rowland was desirous of selling the good-will, stock, and furniture of the said public-house and business to one Thomas Tyrrell, and the defendants agreed to allow the said sale, and to grant a lease to the said Thomas Tyrrell upon payment of the said sum of

£298 5s. 5d., and thereupon upon the said 11th of March the said sale took place, the said moneys were paid, and the lease was granted by the defendants to the said Tyrrell.

The defendants say that the said payment was made in the usual and ordinary course of trade or business and without any knowledge on the part of the defendants of the allegations contained in the declaration as to the contemplation of sequestration.

Wherefore, the defendants pray that the plaintiffs' claim may be dismissed with costs.

The plaintiffs in their replication admitted the existence of the lease, but referred to the original for its terms.

The lease contained the following clauses:

1. "The tenancy shall commence on the first day of August, 1897, and be determined on any day in any year either by the landlord or the tenant by previous notice in writing: the leaving or affixing such notice on any part of the said house and premises to be a sufficient service of such notice.

2. "The rent shall be at the rate of one hundred and twenty pounds sterling per annum, payable in monthly instalments of ten pounds sterling on the first day of each month.

4. "The tenant shall not assign or sublet, nor in any way alienate or part with any of his interest in the said premises, nor during the tenancy quit the actual occupation of the same, nor transfer his licence for the sale of intoxicating liquor to any other person or premises without the consent of the said landlord thereto first had and obtained in writing."

Mr. Graham, Q.C. (with him Mr. Currey), appeared for the plaintiffs.

Sir H. Juta, Q.C. (with him Mr. Gardiner), for the defendants.

W. A. Currey, one of the trustees in the insolvent estate, gave evidence as to the position of the estate. The amount of £135 3s. 6d. shown in the schedules as the deficiency was not the true deficiency. The amount of £298 5s. 5d. in the hands of the defendant company was brought up as assets. The insolvent had a hotel business and bottle store, the Victoria Wine and Spirit Company in Plein-street. He sold the goodwill in July, 1897; in August last he bought the Royal Duke in Loop-street. In July, 1897, he was insolvent; in March, 1898, he was totally insolvent.

Cross-examined: In March, 1898, his assets were the goodwill of the Royal Duke at £600, for which amount it was sold. Rolls became a debtor to Rowland in July, 1897, in the sum of £1,177, and in January, 1898, he surrendered his estate. If this were a good debt and Rowland had received the £600 for the goodwill the estate would just have been solvent.

Re-examined: Rowland got from Rolls £425. Rowland had a lease for ten years two expired and eight to run: he sold the goodwill for cash and consideration in rent. The cash £425 went to defendant company, £12 10s. rent was also to be paid to defendant.

George Rowland, the insolvent, said he commenced business at the bottle store in Plein-street in February, 1897. He had a lease from the defendant company for ten years, paying £10 a month. In July, 1897, he sold the goodwill to Rolls, and got £450 for it; he also received £550 for the stock, fittings, &c. £400 went to the defendants in part payment of his indebtedness. Rolls had to pay witness £70 a month for rent: he subsequently gave up the lease to Rolls, the latter then having to pay defendants the £70 until witness' debt was liquidated: when the debt to defendants was paid Logan & Co. were to get the rent. Rolls paid for five months and then surrendered his estate. Witness purchased the Royal Duke, a going concern, for £410: the goodwill, &c. was bought from Gardiner. The Royal Duke was owned by the defendants. Witness paid £200 cash to the defendants, and £210 by bill: the bill was paid to Bosman. The defendants allowed witness to run up an account for beer up to £100: he had agreed to buy beer from them. Witness was paying his way at the Royal Duke, but was pressed for costs which he incurred in a lawsuit with Steer: he was also pressed by Askew & Co., and thought if he sold the Royal Duke for £600 or £650, he would be able to meet his liabilities; he did not include debts in connection with the Victoria. In March, 1898, he sold the goodwill, stock, and fixtures to Tyrrell for £600, having obtained the sanction of the defendant company. There was delay in getting the consent of the Inspector of Police. Tyrrell was in possession temporarily, he had paid nothing. The Inspector eventually consented, and witness and Tyrrell went to the office of the defendant company and Bultitude the manager told him then that he was going to deduct all that was owing on the

Victoria business; witness objected and went away. A few days later Bultitude told him that only on condition that he would allow defendant to deduct this amount would they allow the sale to go through. Witness said he objected. He then found he was liable for the debts in connection with the Victoria. He told Bultitude that if he deducted that amount he would have to surrender his estate. Bultitude said he wanted what was due to the company, and did not care for the other creditors. The defendants had previously consented to the sale to Tyrrell and had at that time said nothing about deducting the amount. Witness had no copy of the lease; the defendants would not give copies. On the 8th March a letter was written. He knew if the amount was deducted he would not be able to pay his other creditors. Tyrrell wanted assistance when he took over the hotel. Witness was indebted to Maxwell in £115, and the latter agreed to Tyrrell taking over the debt. Tyrrell paid Bultitude £485 and signed a bill for £115. Bultitude gave witness an account showing the amounts he owed on the Victoria and Royal Duke, and gave him £185 in cash as the balance due. Witness then knew that his other creditors would not be paid in full and told Bultitude so. On the 28th April he surrendered.

Cross-examined: He could have been turned out of the Royal Duke at a month's notice. In that event he would have got only £100 for the stock, there would have been no goodwill to sell. Upon giving witness notice the defendants could have got £500 from Tyrrell. Witness sold the Royal Duke because it was to the interest of everyone connected with it; it was sold for the benefit of his creditors. If he had not sold the place his creditors would have got less money. The value of the goodwill is the security of the landlord. Witness did not contemplate that he had any liability for the Victoria. Bultitude offered to cede to witness the debt due by Rolls's estate. Unless he had consented to defendant's terms witness could not have sold to Tyrrell; they could have given him a month's notice. Then he would have got only £100 for the stock; by consenting, he got £185 for his creditors.

After argument by Mr. Graham,

The Court granted absolution from the instance with costs.

[Plaintiffs' Attorneys, C. C. Silberbauer; Defendants' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

ADMISSIONS.

1898.
Nov. 24th

Mr. Benjamin moved for the admission of Gustaff Aspeling de Klerk, as an attorney and notary of the Supreme Court.

The order was granted, and the oath administered.

Mr. Jones moved for the admission of Philip Albert Edward Sheppard, as a conveyancer.

The order was granted, and the oath administered.

PROVISIONAL ROLL.

NORTJE V. LATSKY.

Mr. Benjamin moved for a writ of civil imprisonment on an unsatisfied judgment for the delivery of 410 full-grown sheep, or in the alternative payment of £205, with interest *a tempore moræ*, and costs of suit.

The defendant appeared in person, and said that he had no property at all. Having been sworn, he admitted owing the money, but stated that he had no means to meet the debt. He had returned 170 of the sheep. The rest were dead. He was married and had a wife and ten children. He only earned 1s. 6d. a day.

Cross-examined by Mr. Benjamin: His expenses to Cape Town were paid by a subscription that was raised. He returned the 170 sheep in 1897.

By the Court: He had been so poor since 1896. He had never had land of his own.

De Villiers, C.J., said the man had produced good testimonials, ministers and several other people speaking of him as an industrious and trustworthy man. The decree must be refused.

Maasdorp and Solomon, J.J., concurred.

TREGIDGA AND CO. V. A. J. FLEISCHER.

Mr. Close moved for the final adjudication of the defendant's estate, a provisional order having been granted by the Chief Justice on November 12.

The order was granted.

ILLIQUID ROLL.

AULSEBROOK V. T. R. WATSON.

Mr. Benjamin moved for judgment under Rule 319D for £40, less £2 paid on account, being rent due.

Mr. Buchanan, for the defendant, applied for removal of bar, notice of the intention to apply for such having been given to plaintiff's attorney on November 23. The declaration was filed on November 10, notice to plead served on November 19, and notice of bar on November 21.

In reply to the Chief Justice, Mr. Buchanan said that the defence intended to be raised was that there had been a breach of contract on the part of the plaintiff. It was alleged that a lease was entered into which had been broken in various particulars, and consequently defendant had an action for damages against the plaintiff.

After hearing counsel,

De Villiers, C.J., said that judgment must be by default, and then defendant could take such steps as the law provided for re-opening, or he could bring any action for damages he wished. Judgment would be given as prayed, with costs of the opposition.

WEINGARTEN V. G. P. BUDLER.

Mr. P. Jones moved for judgment, under Rule 329D, for £44 12s. 1d., balance of the purchase price of certain furniture, with interest *a tempore moræ*, and costs of suit.

The order was granted.

HOSSACK'S ESTATE V. HENRY SAVAGE.

Mr. P. Jones moved for judgment, under Rule 329D, for the sum of £81 19s. 11d., balance of rent due, with interest *a tempore moræ*, and that the said defendant be forthwith ejected from the premises.

The order was granted.

FISHER V. W. T. HODGES.

Mr. Molteno moved for judgment, under Rule 329D, for the sum of £2,000, less £100 received on account, being the purchase price of certain household property in Cape Town, the plaintiff tendering transfer of the property.

Granted.

REHABILITATIONS.

Mr. Jones moved for the rehabilitation of the estate of Walter Reginald Tutton and Robert Joseph Tutton, formerly trading together. The estate had been compulsorily sequestrated in June, 1884. No balance-sheet had been filed.

The order was granted.

STEVENS AND ANOTHER V. THE UNION STEAMSHIP CO., LIMITED.

This was an application for a rule *nisi* calling on respondents to show cause why the applicants should not sue them *in forma pauperis* to be made absolute.

Mr. Upington appeared for the applicant.

Mr. Innes, Q.C., appeared for the respondents and asked for leave to cross-examine the applicant, under Rule 335, sub-section (*c*).

Leave having been granted.

The applicant, Alfred William Stevens, stated on oath that he came from Natal in June last. He was not at present doing any work. He had done some work since he came here, but he had lost his last permanent employment through having to come to Court some weeks ago in the present action. He could not at present get any work in Cape Town. The jewellery, &c., sued for were of considerable value. Witness had been in the Royal Naval Reserve for eight years, but had left owing to his eyesight troubling him. He drew no pension.

Examined by Mr. Upington, witness stated that the jewellery belonged to his wife, who had received it from her late mother.

Mr. Innes said he could not fairly press his opposition after hearing the evidence of the applicant.

The rule was made absolute.

STORMONT AND OTHERS V. MZIMBA AND OTHERS.

This was an application for a rule *nisi* to be made absolute, restraining the respondents from dealing with the property of the native congregation at Lovedale of the Free Church of Scotland.

Mr. Innes, Q.C., appeared for the applicants.

Mr. Searle, Q.C., appeared for the respondents, who consented to the application upon certain conditions which he put in. These conditions were to the effect that the applicants should go to trial next term, and that the consent to the rule being made absolute should in no way prejudice the respondents in any defence they might hereafter raise with regard to the *locus standi* of the applicants, or any of them.

The rule was made absolute, subject to the conditions put in.

IN THE MATTER OF THE PETITION OF EMILY MACDONALD.

This was a motion by the executrix testamentary of the estate of the late Gregor Roy Campbell MacDonald for a rule *nisi* under the Derelict Lands Act, 1881, to be made absolute.

Mr. Buchanan appeared for the applicant.

The order was granted.

IN THE ESTATE OF THE LATE ELIZABETH CATHARINA JOHANNA VENTER. Nov. 23rd. Dec. 12th.

Mr. Close applied for an amendment of an order granted on June 14 last.

The Court ordered that the application should be referred to the Master.

Postea (December 12th).

The application was granted in terms of the Master's report.

IN THE ESTATE OF THE LATE JOHANNES ANDREAS VAN DEN BERG.

Mr. Joubert moved for an order authorising the Master to pay over to the widow of Van den Berg certain moneys standing to the credit of minors to enable her to restock their farm or otherwise for leave to mortgage the said farm.

The Master's report being favourable, the Court granted the order.

IN THE ESTATE OF THE LATE HENDRICK FREDERICK CANTERBURY.

Mr. De Waal moved for leave to mortgage certain property for a sum not exceeding £190.

The Master's report was favourable to the application, and the Court granted the order as prayed.

SEARLE AND SON V. ARKELL AND DOUGLAS.

Mr. McGregor moved for leave to serve intendit and notice of trial along with the citation previously ordered.

The Court granted the order.

STIGLINGH V. RHODES

This was an application by the plaintiff for the fixing of a day for the hearing and trial of the cause by a jury as claimed by the defendant.

Sir Henry Juta, Q.C. (with whom was Mr. McGregor), appeared for the applicant.

Mr. Innes, Q.C. (with whom was Mr. Graham, Q.C., and Mr. Sampson, Q.C.), appeared for the respondent.

The Court fixed December 14 as the day of trial.

RICHMOND CAVENDISH COMPANY V. W. S. DUKE AND CO.

This was an application for an order restraining respondents from using the word "Pioneer" in respect of or in connection with the sale of tobacco, cigars, or cigarettes.

Mr. Searle, Q C., appeared for the applicants.

Mr. Upington appeared for the respondents.

Mr. Searle said that the respondents had twice applied to have the trade-mark registered. The first application was not proceeded with, and the second application was refused by the Registrar of Deeds, but notwithstanding that, the respondents continued to use the trade-mark. The applicants, who carried on their business at Liverpool, England, had had their trade-mark registered in this colony for the last ten years.

On behalf of the respondents an affidavit made by Mr. Schrieber, carrying on business as W. S. Duke & Co., was read, consenting to the application, but asking that the applicants pay the costs of the application as he had made an offer to the applicants to discontinue using the labels when the present stock was done, or at the end of the year. He further stated that his employés were now busy obliterating the marks complained of.

After hearing counsel,

De Villiers, C.J., said: This is not one of those cases where the Court holds that there has been an unintentional infringement of a trade-mark, for here that infringement must have been quite intentional. An application was made to the Registrar of Deeds by the respondents for the registration of this trade mark "Pioneer," but was refused, on the ground that the trade-mark had already been registered. Notwithstanding this refusal, the respondents continued to sell cigarettes under this trade-mark. Surely it was their duty at once to have asked the applicants to be allowed to sell what they had in stock, and to have promised not to sell any more. Instead of that, they continued to sell, and forced the applicants to come into court to assert their rights. The applicants were quite justified in coming into court and asking for this interdict, and the order must be granted with costs.

STEER AND CO. V. IMPEY. { 1898. Nov. 24th.

Broker's commission—Raising loan on mortgage—Conveyancer.

The plaintiff, who had been employed by the vendor of certain land as conveyancer to transfer it to the purchaser, was employed by the purchaser as broker to raise a loan on mortgage of the land. He obtained the promise of a loan from A. but, owing to a defect in the title, of which the purchaser had no previous knowledge, transfer could not be effected in terms of the purchase and the loan fell through.

Held, *that the plaintiff was not entitled to a commission from the purchaser for his services in obtaining a promise of the loan.*

This was an action for the recovery of £30 commission alleged to be due by the defendant to plaintiff in connection with the raising of a sum of £1,200 on the mortgage of certain property.

The declaration set forth that the plaintiff, who is a broker and commission agent, &c., was engaged by the defendant to raise a loan of £1,200 for him. Plaintiff succeeded in raising that loan for the defendant with the South African Association at 5 per cent. It was alleged, further, that it was agreed that the defendant should pay the plaintiff the full commission, and the ordinary reasonable commission was 2½ per cent. That commission the defendant now refused to pay.

The defendant in his plea admitted the refusal to pay the commission and said that in July, 1897, he had purchased from one M. Falconer a certain household property in Roos-street. Cape Town, for £1,850: that R. A. Falconer undertook to arrange that a bond of £1,200 held over the property by one Marsh should remain upon the property: that thereafter Falconer introduced the defendant to plaintiff as the said Falconer's agent to pass transfer, and plaintiff arranged that transfer should be passed about August 1, 1897; the defendant informed plaintiff about the arrangement respecting Marsh's bond. whereupon the plaintiff said he was Marsh's agent, and would require £60 for arranging with Marsh that the bond should remain on the property; that thereafter the defendant agreed to pay plaintiff £30, provided that Marsh's bond of £1,200 should remain, and that plaintiff should forthwith execute the transfer: that thereafter the plaintiff and Falconer were unable to pass transfer by reason of the defective titles to the property: and the sale was cancelled. In or about May, 1898, the defendant purchased from Falconer a certain household property in Horsley-street, Cape Town, for £1,850, and arranged for a bond of £1,200 from the Board of Executors. He said further that the plaintiff had at no time carried out the agreement to obtain Marsh's consent, and at no time was he authorised to raise any loan from the South African Association.

The replication denied any undertaking on plaintiff's part that he undertook to arrange for Marsh's loan to remain on the property, and said that it was agreed that he should attempt to raise the loan from Marsh, but that if he was unable to do so he should raise it from the South African Association. It alleged further that the failure to give transfer of the land originally sold was not owing to plaintiff's fault or negligence, and that the land referred to in the latter part of the plea was substituted for it as security for the loan and accepted by the South African Association as security. He admitted the refusal to pay the commission, which he proceeded to justify on the ground that he had at no time authorised the plaintiff to raise any loan with the South African Association, and that the loan said to have been raised had been so raised on property defendant had bought in Horsley-street, and not on property in Roos-street, with regard to which defendant had had negotiations with the plaintiff for the taking over of a certain bond, but the sale of which property to defendant was never completed owing to some defect in the title.

Mr. McGregor appeared for the plaintiff.

Mr. Molteno appeared for the defendant.

Robert Augustus Falconer, residing in Cape Town, said that he was married without community of property, and acting as agent for his wife, sold certain ten houses in Roos-street to Dr. Impey for £1,850. At that time there was a mortgage bond of

£2,000, held by Mr. Marsh, over twenty houses there, and Dr. Impey wished for a mortgage bond of £1,200 over the ten houses he had bought. At his request witness went to plaintiff to see what arrangement could be made. The first thing Steer wanted to know was how much he was to be paid for the work, and said that if he got the money from Mr. Marsh the commission would be 1¼ per cent, but if he got it elsewhere he was to receive 2½ per cent. Dr. Impey agreed to that. Witness was present at a meeting between plaintiff and defendant when Steer said that Mr. Marsh would only advance £1,000, but he could get the money elsewhere. Dr. Impey said that was all right, and told Steer to get the money elsewhere. Steer then said : " Mind, doctor, that will be at 2½ per cent." Next day a sale-note was passed.

Cross-examined : Witness never told defendant there was a bond for £1,200 on the ten houses, nor did he undertake at the time of the sale to get Mr. Marsh's bond to remain on the property. Afterwards a hitch arose, and the property could not be transferred, 10 feet of land having been sold to which witness had no title. That matter was afterwards settled, Dr. Impey purchasing ten houses in Horsley-street instead.

By the Court: The reason that the first sale did not go through was the defect in the title with regard to the small piece of land mentioned.

F. B. Steer, broker, commission agent, and conveyancer, carrying on business in Cape Town, corroborated the previous witness as to the arrangement for raising money for the defendant. At the meeting in his office, when he had a conversation with Dr. Impey in the presence of Falconer, the South African Association was mentioned as a body from whom witness could raise the money in case he could not get Mr. Marsh to increase the existing bond from £1,000 to £1,200. Witness failed to obtain the money from Mr. Marsh, and he then applied to the South African Association for the loan. That was on July 22, and next day he received an answer to the effect that the sum of £1,200 had been granted upon security of ten houses situated in Roos-street, Cape Town. Witness informed Dr. Impey verbally after that. Then the hitch took place in the transfer of the property, and the diagrams were returned by the surveyor. On November 15, 1897, witness sent the letter produced to defendant, asking for his £30 commission for raising the money, but received no reply.

By the Court : When witness wrote that letter he knew that the hitch still existed, but still claimed that he was entitled to his commission whether the sale went through or not. Witness told Dr. Impey that he had got the money, which was then at his disposal, and that he would have to pay interest on it. Dr. Impey said it mattered very little, as he was entitled to the rents.

De Villiers, C.J.: Surely you told the association about the hitch ?

Witness: No, we were hoping every day that it would be removed.

Examination continued : The houses in Horsley-street were substituted at Dr. Impey's request.

By the Court: Witness got verbal authority from Dr. Impey to the substitution of those houses.

Cross-examined : Witness was now suing for the money to be raised on the new property. The notes written in red ink on the back of the power of attorney to raise the loan were made after Dr. Impey and Falconer had left witness's office. These notes referred to the terms of the commission, and were written by witness. Witness did not remember one of Messrs. Sauer & Standen's clerks coming to him on behalf of Dr. Impey and repudiating liability for the commission.

By the Court: Witness was really entitled to double commission, but he would forego the first and insist upon the second.

H. A. Bidewell-Edwards stated that 2½ per cent. was a reasonable commission in a case of that kind. Witness had known cases where the commission had been paid, although the loan did not go through. Witness had had cases where loans had been granted but not taken up. Witness in such cases made a concession, and charged only half.

This closed the case for the plaintiff.

For the defence,

Dr. Samuel Impey, the defendant, deposed that when he purchased the houses in Roos-street he was to pay £650 and take over a bond of £1,200. Witness did not then know Mr. Steer in the way of business. Witness told Falconer that his attorneys were Messrs. Sauer & Standen, but Falconer objected, and said that the whole thing must go through Mr. Steer. When witness afterwards saw Mr. Steer the latter said that he could not get the bond for £1,200, as Mr.

Marsh, who held the bond for £1,000, would not give the other £200. Afterwards when Falconer was present witness agreed to give plaintiff £30 if he arranged about the bond at once, plaintiff saying that he was Mr. Marsh's agent and could perhaps arrange it. Witness never at any time gave Mr. Steer authority to insert the Horsley-street property in the bond. He never intended that power of attorney to be used for any other property than that in Roos-street. About the beginning of May he knew for the first time that the money was being obtained from the South African Association. When he had arranged to take the Horsley-street property he went to the Board of Executors and arranged a loan. Witness had had transactions himself with the South African Association, and could have raised the money there himself, and saved the commission.

Cross-examined: There was no mention of £15 being paid to Steer, nor about 1½ or 2½ per cent.

Harry Thomas Standen, of the firm of Sauer & Standen, attorneys to the South African Association, gave evidence as to the procedure employed by the association in granting loans. Witness was a conveyancer. When he arranged a loan he got commission, not always 2½ per cent. He never got commission when the loan did not go through.

W. G. Combrink, clerk to Messrs. Sauer & Standen, said that he was also a conveyancer. He communicated certain instructions he had received from Dr. Impey to Mr. Steer. These instructions were to tell Mr. Steer that Dr. Impey had never authorised the raising of money from the South African Association, and that he had negotiated a loan with the Board of Executors.

Cross-examined: When witness told Mr. Steer that, the latter said, "Oh, is that the game?"

Mr. McGregor: The power of attorney was written upon the form of the South African Association and the documentary evidence seems to show that there was some arrangement by which it was agreed that the money should be obtained from the association. Steer obtained the loan from the association as the defendant's mandatory, the commission was earned then.

[De Villiers, C.J.: Is a loan raised before the money is paid over?]

An acceptance of the work done is binding although the loan falls through. *Fisher* v. *Drewitt* (48 L.J., Ex., p. 22). In the present case the loan did not fall through owing to negligence on the part of the plaintiff. *Evans on Principal and Agent* (2nd edition p. 400); citing *Green* v. *Lucas* (31 L.T.P., 731).

[De Villiers, C.J.: Must there not be some default on the defendant's part to make him liable?]

I submit that there must be default on the plaintiff's part in order to make him forfeit his commission. He was quite justified in what he did, the defendant wanted the matter settled early and the plaintiff was vigilant in approaching the association.

De Villiers, C.J.: The facts of the case, stripped of all superfluous matter, are very simple. One Falconer had a house for sale and entered into negotiations with the defendant who wished to purchase it. Falconer introduced the plaintiff, who was his conveyancer, to the defendant, and it was arranged between the plaintiff and the defendant that the former should raise a loan on the property to be effected on completion of the transfer. The plaintiff obtained a promise of the money from the Association on the security of a mortgage on the land, but owing to a defect of title. Falconer could not effect transfer of the house to the defendant, and it was arranged between them that another house should be transferred instead of the one originally bought. The defendant obtained a loan on security of the new house without the intervention of the plaintiff, who thereupon sued the defendant for his commission for obtaining a promise of a loan from the Association. The defendant had no previous knowledge of the defect in the title. The plaintiff now claims his commission for his services as broker in obtaining a promise of the loan from the Association. If he had not been the conveyancer employed by the seller, it might fairly have been said that as he had been put to the trouble of obtaining a promise of the loan, he should be paid for his services. But being the conveyancer, he ought to have known of the defect in the title, and should not have put the defendant to any expense in the matter of the loan until it was clear that the title was in order. The defendant was not bound to employ the plaintiff as broker to obtain a loan on mortgage of the house actually transferred in lieu of the one originally bought. The original purchase having fallen through owing to no fault of the defendant, but owing to a defect of title of which the plaintiff should have known, there is no obligation on the defendant to pay the plaintiff for services which the plaintiff must have known would be of no benefit to the defendant. Judgment must therefore be given for the defendant with costs.

Maasdorp and Solomon, J.J., concurred.

[Plaintiffs' Attorney, A. W. Steer; Defendant's Attorney, Messrs. Sauer & Standen].

DITTLER V. KAMP.

1898.
Nov. 24th.
,, 26th.
Dec. 20th.

Agent—Manager—Authority—Evidence—Powers of Attorney—Contract to supply fish.

The plaintiff purchased a fishmongery business belonging to S. *at Kimberley.* S. *was at the time indebted to the defendant in a sum exceeding the purchase price and it was agreed through* M. *who in so far acted for the defendant, that promissory notes for the purchase price should be made by the plaintiff payable to the defendant.*

M. *was the manager of the defendant's branch fishmongery business at Port Elizabeth, holding certain written powers from him, and at the time of the sale he entered into an agreement binding both the defendant's business at Cape Town and the branch business at Port Elizabeth to supply the plaintiff, and no one except him, with fish at Kimberley. This agreement however was made subject to confirmation by the defendant, and this confirmation was not obtained.*

Held, *that this agreement did not come within the scope of* M.'s *ordinary powers as manager, and as it was not included in his written powers it was not binding upon the defendant.*

Semble, *the sale of* S.'s *business and the agreement to supply fish were perfectly distinct contracts and even if the defendant were liable on both the failure to perform the latter would not entitle the plaintiff to recover the consideration for the former contract.*

This was an action for breach of contract. The declaration was as follows:

1. The plaintiff at the time complained of carried on the business of fishmonger at Kimberley; the defendant carries on the business of selling and supplying fish at Port Elizabeth and Cape Town.

2. In the month of July, 1898, a certain business of fishmonger was carried on in Kimberley under the style of the Algoa Bay Fisheries (Steinhardt & Co.) by one Julius Steinhardt.

3. In the said month the plaintiff entered into negotiations for the taking over of the said business with one Manasse, who was the manager of the defendant's business at Port Elizabeth, and his duly authorised agent on that behalf.

4. The said business, carried on as aforesaid by the said Julius Steinhardt, was in reality the business of the said defendant, but the plaintiff was not aware of the said fact until after the arrangements, contracts, and facts hereinafter stated.

5. As a result of the said negotiations on the 29th July, 1898, an agreement in writing was entered into between the plaintiff and the said Manasse, acting as the duly authorised agent of the said defendant, and the said defendant thereby agreed not to supply anybody at Kimberley with fresh fish, English fish and soles, except the plaintiff for a term of two years from the said date, and the plaintiff agreed in consideration not to buy fish from anybody except from the defendant at his Cape Town or Port Elizabeth branch, and on the 30th July the plaintiff as a result of the said negotiations with the said Manasse, acting as aforesaid on behalf of the defendant, entered into a written agreement with the said Algoa Bay Fisheries (Steinhardt & Co.), for the taking over the said business, copy of which is annexed, and on the same date the plaintiff entered into a written lease, which is, however, dated 29th July. 1898, with the landlord of the premises in which the former business of the Algoa Bay Fisheries (Steinhardt & Co.), was carried on, for a lease of such premises for a period of eighteen months.

6. The said agreement, &c., as in the last preceding paragraph mentioned as having been entered into by the said Steinhardt, was in reality entered into by him for and on behalf of the defendant as his undisclosed principal.

7. The plaintiff duly carried out his part of the said contract, but the defendant towards the end of August, 1898, wrongfully

and in breach of his contract began to stop the supply of fish ordered by the plaintiff, and on the 1st September wrongfully refused to supply the plaintiff with any fish, and has continued such refusal notwithstanding that the plaintiff has always been ready and willing to carry out his part of the agreement, and has requested the defendant to supply him with fish.

8. The said business was a profitable one, and was rapidly increasing, &c.

9. By reason of the refusal of the defendant as aforesaid the plaintiff was unable to carry on the said business, and compelled to close it.

10. Under the agreement aforesaid, on the 30th July, 1898, the plaintiff signed two promissory notes—one for £250 at three months, and one for £239 at four months. The said notes were given in fact and reality to the defendant, who has received all the value and benefit therefrom, and the plaintiff says that by reason of the defendant's breach of contract there has been a failure of consideration for the said notes.

11. By reason of the premises the plaintiff has suffered damage to the extent of £2,000, including the £150 for outstandings contained in the agreement of the 30th July, and is liable on the two notes.

Wherefore he claims £2,000 damages and the delivering up to him of the two promissory notes, or payment of the amounts thereof.

The defendant in his plea denied the authority of Manasse to enter into the negotiations referred to. He admitted the execution of the agreement of the 30th July, annexed to the declaration. He denied the allegations in the 6th and 7th paragraphs. He said that apart from such contract he was always willing to supply plaintiff with fish in the ordinary course of business, and from time to time did so, but did not on several occasions, because he could not obtain it. He said the notes were signed in accordance with the agreement annexed to the declaration, and the amount thereof would be handed to Steinhardt, after deduction of the sum owed by the latter to him. Issue was joined on these pleadings.

Agreement (Annexed).

Entered into between Julius Steinhardt' trading as Algoa Bay Fisheries, Steinhardt & Co., at Kimberley, in D'Arcy-street, and Fritz Dittler, at present residing at Kimberley.

Whereas it has been agreed upon:

1. That the party of the first part shall sell to the party of the second part certain business, carried on in D'Arcy-street, Kimberley, under the name of the Algoa Bay Fisheries, Steinhart & Co., proprietors.

2. That the purchase price of the said business shall be two hundred and fifty pounds sterling for goodwill.

3. That the furniture and other plant as per attached list shall be taken over by the party of the second part for eighty-nine pounds sterling.

4. That all outstandings shall be taken over by the party of the second part as per attached list, the party of the first part binding himself to hold himself responsible to the party of the second part for the full amount of such outstandings as a whole, as well as for each and every one. Any expenses arising through collecting these outstandings to be paid for by the party of the first part until all such outstandings have been collected by the party of the second part.

5 That the party of the second part shall not be responsible for any debts contracted by the party of the first part in connection with the business called Algoa Bay Fisheries up to and inclusive July the thirtieth, 1898, all goods, outstandings, and goodwill to be the entire property of the party of the second part from first August, 1898; any amount or amounts owing on or for them to be paid by the party of the first part.

6. That the party of the first part shall cede to the party of the second part all contracts and leases entered into by him on behalf of the above-mentioned business.

7. That the party of the first part shall not at any time enter into any business of a similar nature, neither direct nor indirect, at Kimberley or within twenty miles around Kimberley, nor supply anybody, direct or indirect, with fish or such like goods at Kimberley or within twenty miles around Kimberley.

8. That should any part of the outstandings not be recoverable from neither the party owing the amount nor from the party of the first part, then this amount or such amounts shall be paid by H. Kamp, of Port Elizabeth, to whom the party of the second part shall pay the purchase price, as well as the amount for plant and outstandings.

9. That H. Kamp, of Port Elizabeth, shall pay the party of the first part the amount paid to him by the party of the second part.

10. That the amount due to the party of the first part called outstandings shall be taken as one hundred and fifty pounds sterling.

11. That any amount which may be due on the 31st July, 1898, over and above the said one hundred and fifty pounds to the party of the first part shall be paid in cash by the party of the second part to the party of the first part, and, if the outstandings on July 31st, 1898, should amount to less than one hundred and fifty pounds, the party of the first part shall pay any such difference in cash to the party of the second part.

12. That the party of the first part has declared that all those articles mentioned in attached list are his property, and that he is at liberty to dispose of them as above stated.

13. That the party of the first part shall hand over to the party of the second part the abovementioned business on the thirtieth day of July, 1898, after closing time, and that any fish then on hand shall be taken over by the party of the second part at cost price.

Signed in presence of witnesses this thirtieth day of July, one thousand eight hundred and ninety-eight, at Kimberley.

The Algoa Bay Fisheries, Steinhardt & Co., proprietors, Julius Steinhardt, Fritz Dittler.

Sir H. Juta, Q.C., and Mr. Buchanan for the plaintiff.

Mr. Innes, Q.C., and Mr. Jones for the defendant.

Fritz Dittler, the plaintiff, deposed that he met Mr. H. Kamp on the steamer when he came out to this colony from England last year. They talked a lot about Mr. Kamp's business, the ice factories, the fish business, and so on. Witness went to Port Elizabeth and there met Manasse, whom witness understood to be Kamp's agent. Afterwards, in consequence of a wire he received from Manasse, he proceeded to Kimberley, and arranged to take over Steinhardt's business. Witness agreed to purchase that business, paying £250 for the goodwill, £150 for outstanding, and £89 for the stock-in-trade, making altogether £489. Witness wanted to pay £300 in cash, and pay the rest in three months. Ultimately he signed bills for the amount. Manasse acted throughout in the business as the agent of defendant. Witness had also a contract with Manasse on behalf of Kamp under which he alone in Kimberley was to be supplied with fish from Kamp's factories for a period of two years, and on the other hand he was to purchase from no other person. Afterwards Kamp began pressing him to take up the promissory notes, as the banks would not discount them, witness being unknown, or get them endorsed so that they would be taken up. Witness did not comply, and Manasse then wrote threatening that unless the promissory notes were taken up the supply of fish would be stopped. About August 29 Manasse came to Kimberley and he and witness had a conversation over the stoppage of the supply of fish. Afterwards Manasse said that the agreement was worth nothing, as he had no right to sign for Mr. Kamp. Witness told him that he had seen that for the last five or six years he had signed for Mr. Kamp in the Port Elizabeth books. Manasse left without any arrangement being come to, and the supply of fish was stopped. Witness had some stock in the shop, and with that he carried on for a little time. He then gave evidence as to the damage he had sustained. In the month after he took over the business he made £50 a month; he could have made more afterwards. Witness was prepared to go on with the business, and would have paid the promissory notes when they became due.

Cross-examined: Witness knew that Mr. Kamp had little confidence in Manasse, but he had never been told by defendant that Manasse had no power to act for Mr. Kamp in selling that business. If witness had known that he would never have gone to Kimberley. On the 29th July, Manasse handed witness the letter containing the contract, and said he must send it to Kamp. Witness became very angry at that, and Manasse then said he had the right to sign the contract, and that Kamp was bound to recognise that.

[Before the Hons. Mr. Justice MAASDORP and Mr. Justice SOLOMON].

Postea (November 26th).

The cross-examination was continued.

Plaintiff, admitted that he wrote letters to Manasse complaining of bad business, and that he had referred to "this detestable deal." From the representations made to him he thought the business would be more profitable. He closed the shop on October 1, and it was now closed. The telegram of October 3 from Mr. Kamp, asking if he intended ordering any more fish, he thought was a trap. He had collected £82 of Steinhardt's outstandings, and that all went into the business.

Re-examined: He went through the whole of the Port Elizabeth business, and was able to ascertain Manasse's position. When no more fish was sent the business was ruined.

Maynard Nash, member of the Society of Accountants, stated that he had examined the plaintiff's books of the fish business carried on at Kimberley. For the month of August the profit shown by the books was £53 7s. 4d. He had been shown three books of defendant's business at Port Elizabeth. The one was apparently a record of fish caught, and the other two rough sales books. There were some figures in the two latter books which he had no doubt referred to some other book. The books produced were not sufficient for a business of the kind. It would be impossible to find out the position of the business from those books. Witness could not, from the Port Elizabeth books, trace the transactions between defendant's business at Port Elizabeth and Steinhardt. The Cape Town books merely showed Steinhardt as an ordinary customer. The Cape Town books would be no evidence that Steinhardt's business at Kimberley was not Kamp's. If witness had had the cash-book, journal, and ledger of the Port Elizabeth branch he could have ascertained the exact position of Steinhardt with regard to the business.

After correspondence between the attorneys had been put in, the case for the plaintiff was closed.

For the defence,

Franz Joseph Manasse stated that he was in the employ of Mr. Kamp, and had since 1893 managed the business at Port Elizabeth, carried on under the style of the South African Ice Works. In 1893 and 1894 Mr. Kamp gave witness two powers of attorney giving him instructions as to what he had to do. Those were the only powers witness had received.

Mr. Innes proposed to put in powers.

Sir H. Juta objected.

The Court over-ruled the objection.

Mr. Innes put in the powers, the first of which was a power to collect sums of money, and give receipts for the same, while the second authorised witness to draw cheques, endorse bills, and collect moneys.

Examination continued: In May, 1898, Steinhardt came to see witness, and witness floated bills to start Steinhardt in business in Kimberley. At that time witness did not ask Mr. Kamp's consent, although the latter afterwards saw the entry in the books. The business entirely belonged to Steinhardt, witness supplying him with fish. At the end of July witness received information which compromised Steinhardt, and he then went to Kimberley. At that time Steinhardt owed Kamp altogether £300. Before witness went to Kimberley he mentioned to Dittler that Steinhardt would probably have to give up business. Steinhardt agreed when witness saw him, to give up the business, the terms being £250 for the goodwill, £50 for the stock, and the outstandings to be taken over at full book value. Witness wired to Dittler, and the latter came to Kimberley, and on July 28 the terms of the contract were settled. Witness wrote out the draft of contract, and it was signed on July 30. There was some discussion about payment, witness trying to arrange a cash payment, but that fell through and the bills were arranged. As Steinhardt could not get the bills discounted, they were made payable to Mr. Kamp. Dittler had wired to Mr. Kamp that he was to meet witness in Kimberley. Witness wrote the letter of the 29th July, containing the contract to supply fish because Dittler pressed him to do so. That was in the Central Hotel, Kimberley. Dittler said, "I have signed everything, but what have I bought now?" He wanted witness to guarantee a supply of fish. Witness told him he had no power to do so, but on being pressed he wrote the letter and told Dittler to send it to Mr. Kamp. He also told Dittler that he had no power to sign contracts, as Dittler himself knew. When witness saw Mr. Kamp at Port Elizabeth on September 15, he did not mention the letter. He had forgotten all about it. The bank would not discount the bills, as they did not know Dittler, and witness tried to get him to make arrangements for taking up the bills or by depositing shares to get them discounted. On August 25, in consequence of Dittler neglecting to do so, witness wrote threatening to stop the supply of fish. On August 29, witness went to Kimberley and saw Dittler. After conversation, Dittler said he would give £300 cash and a bill, and witness said that if he did so Mr. Kamp would be in Port Elizabeth and a new contract would be drawn up with a scale of prices in it at which fish would be supplied for two years. Dittler agreed to that and witness said that when he got back to Port Elizabeth he would draft the agreement. Dittler said he would have it done by his attorney. Witness returned to Port Elizabeth. Dittler did not send the draft agreement. The last supply of fish sent was on September 1. An order witness received from Dittler on September 3 was not executed. Fish was then very scarce, in fact there was none to be had. On September 5, witness received a wire from Dittler as follows: "What is the matter? No fish arrived; hold you responsible for damages." Witness replied that he had not received the draft agreement, and demanded strict adherence to the arrangement. Witness sent no fish that day. He had very little fish and what he had went to Johannesburg. In the Port Elizabeth business there were two ledgers, a day-book, journal, and cash-book. Witness had not brought those. He had only been asked to bring the necessary books with him, and he had brought all the books he considered necessary in this case.

Cross-examined: Witness was still the manager of the business at Port Elizabeth. He had been general manager since December, 1893. It was a large business, and the buildings had cost thousands. They had trawlers, and thirty-four men were steadily employed. Witness contracted with the men as to their wages, engaging them and paying them off. He would not say that the contracts he had made with the men on those trawlers were worth nothing. Witness had made a contract with Steinhardt to supply him with fish. He did not tell Mr. Kamp, because Steinhardt was to visit Cape Town himself and see Mr Kamp. The second time witness went to Kimberley, he again told Dittler that the contract was worthless unless Mr. Kamp signed it. There were six other people in Port Elizabeth from whom a supply of fish could be got. Witness had made a mistake in his examination-in-chief when he said that he did not tell Mr. Kamp about the letter when the latter came to Port Elizabeth on September 15. He did on that occasion mention the letter. Witness denied that he had stopped the supply of fish. The order of September 1 was sent, and on September 3 there was no fish to send. Witness had been at Kimberley recently. He went there about a big contract with De Beers, and not to see about starting a branch of Mr. Kamp's business.

Julius Steinhardt deposed that in May this year he and Mr. Manasse had a certain conversation about witness starting business in Kimberley. An arrangement was come to, and witness gave two bills to Manasse in favour of Mr. Kamp. It was a profitable business. In two months witness made between £130 and £140. In consequence of witness getting into trouble in July Manasse came up to Kimberley, and witness agreed to sell on the terms mentioned. Then the sale to Dittler took place. After the contract was signed, a conversation took place, and the letter regarding the supply of fish was given to Dittler by Manasse. The latter said he could not give a contract, but after he wrote the letter he asked if that would do. He said the letter had to be sent to Mr. Kamp, who would make out the contract. Mr. Kamp had paid out witness by giving him £178.

Cross-examined: Witness was arrested on a criminal charge on July 23, and the case was settled on August 6. He carried on the business as usual. The arrest made no difference to his business.

Postea (December 20th).

Heinrich Kamp, the defendant, said he carried on business in Cape Town as the South African Ice Works. Manasse managed his business at Port Elizabeth while defendant was absent: Manasse had no general powers, and no powers besides the written ones put in; he had instructed Manasse as to what work he could do. The Port Elizabeth business was a branch of the Cape Town business: plaintiff had trawlers there, and fishing boats, ice-works, and dealt in game and poultry. He did not know of the contract between Manasse and plaintiff till this action commenced: first saw letter of 29th July, after the declaration was issued. Defendant met plaintiff on the way to Port Elizabeth in June: at Port Elizabeth told him that he was not satisfied with the business and requested him to look into the books and report to him. At the Grand Hotel there he told him in the presence of Manasse that Manasse had no power from him, and that he had only to do with open accounts: he told plaintiff that Manasse had no power to make contracts. He left plaintiff at Port Elizabeth. After that he wrote to defendant: he first heard from Kimberley of the business done there but knew nothing of the terms of the transacaction. He wrote to plaintiff asking him on what terms he had taken over Steinhardt's business, but got no reply. He supplied plaintiff with fish from Cape Town and there was a balance of £19 still due. He received a telegram from him on the

6th September: he then wired to Manasse, and on the 9th September left for Port Elizabeth; on the 12th saw Manasse, and on the 15th wired to the plaintiff. Defendant had contracts in Johannesburg and had to send a certain quantity of fish every month to that place. He made that contract himself. The supply of fish was short when he was at Port Elizabeth. The promissory notes had not been paid, nor had defendant received what Steinhardt owed him. He had had to pay Steinhardt £178, which would have been the balance due to him if the notes had been paid.

Sir H. Juta: The confirmation by the plaintiff agreeing to the offer in Manasse's letter of the 29th July was a verbal confirmation. The contract for the sale of the Kimberley business was carried out by Manasse as the defendant's manager. The business was really the defendant s business. There was no consideration for the £489 except the goodwill of the business and that was the agreement to supply fish.

Maasdorp, J.: Would not Manasse's implied authority be that he should get in as much fish as possible and sell as much as he could.

Sir H. Juta: Yes.

Maasdorp, J.: Then is it not a contradiction of this that he should bind himself to one man to the exclusion of all other customers?

Sir H. Juta: The meaning of the contract is that he should send a reasonable amount of fish having regard to the haul, the weather, &c. Manasse's conduct was ratified by the defendant.

Mr. Innes: There is a confusion between the two contracts: they are entirely different. Manasse's authority was limited and limited to the knowledge of the plaintiff. The defendant was in perfect ignorance of what was going on. The plaintiff never acknowledged the letter of the 29th July, nor sent it to defendant. The contract itself is vague and inchoate: it does not undertake to supply fish. Even if it had and there had been a failure to supply, plaintiff could have bought elsewhere

Sir H. Juta: The whole matter was one transaction.

Maasdorp, J.. said: The main questions in issue between the parties are substantially whether the fishmonger's business carried on at Kimberley by Julius Steinhardt was in fact the business of the defendant, and was by him sold through Manasse as his duly authorised agent to the plaintiff; and whether Manasse, acting as the duly authorised agent of the defendant, entered into a contract with the plaintiff to supply him and no one else at Kimberley with fish. A large mass of documentary evidence has been adduced, but for the purposes of the judgment it is not necessary to wade through all the correspondence. The plaintiff, on the ground that the defendant has committed a breach of contract in refusing to supply him with fish, claims from the defendant the delivery of two promissory notes given for the purchase price of business, and the sum of £2,000 as damages sustained by him. It certainly struck me in reading the declaration that the pleader had some difficulty in combining these two claims, and that this combination and the confusing of the two contracts have given rise to a confusion of ideas. Even if the defendant were liable upon both the contracts, it would appear that they were under the circumstances such separate and distinct contracts, that it would be difficult to see how the failure to supply fish to the business would entitle the plaintiff to recover the consideration given by him for the sale of the business. But the case will be very simplified by at once eliminating from it the contract of sale. There is no evidence to prove that the business carried on by Julius Steinhardt at Kimberley belonged to any one but Steinhardt himself. It appears that it was sold by Steinhardt to the plaintiff for the sum of £489, and Steinhardt being at the time indebted to the defendant in a sum upwards of £489, it was agreed through Manasse, who in so far acted for the defendant, that promissory notes for the amount should be made by plaintiff, payable to the defendant subject to certain conditions. The intervention of Manasse in thus securing payment of Steinhardt's debt to the defendant in no way affects the subsequent agreement for the supply of fish. Dittler having become the owner of the fishmongery business at Kimberley, asked Manasse as the manager of the defendant's business at Port Elizabeth to enter into an agreement binding both the defendant's business at Cape Town and the Port Elizabeth branch to supply him, and no one except him, with fish at Kimberley. Manasse wrote a letter addressed to the plaintiff embodying such agreement, but told him at the same time that it would be necessary to send it down to the defendant for confirmation, as he had no power to enter into such a contract. The plaintiff, who was at the time in constant correspondence with the defendant, never mentioned this agreement to him and did not obtain his ratification. It is now contended that confirmation and ratification were unnecessary, because Manasse had full power to act in the matter on behalf of the defendant. The powers given by defendant to Manasse were twofold, written authority, and such as might be inferred from his appointment as defendant's manager at Port Elizabeth. The written authority confers on him no such power as is contended for the plaintiff. What his powers were as manager is not so clear. As manager he would certainly be entitled to carry on the ordinary transactions of the business at Port Elizabeth, which would consist of getting in supplies of fish by means of the defendant's boats, and selling fish to customers generally. But it would be difficult to extend such powers to a right on the part of Manasse as manager at Port Elizabeth to place restriction on the defendant's business at Kimberley. Especially when it is borne in mind that Manasse was within easy reach of communication with the defendant, and it was as easy for the defendant to deal directly with persons at Kimberley as for his manager at Port Elizabeth. I come to the conclusion that Manasse had no authority to enter into the contract for the supply of fish on behalf of the defendant. I quite agree with the contention that if Manasse as manager possessed these large powers, they could not be restricted by private instructions from defendant in respect of dealings with persons who were not aware of those instructions. Then it was also contended that whatever Manasse's original powers were they were extended by the mode of dealing between him and defendant, who is said to have acquiesced in and ratified other similar contracts made by Manasse. There is no evidence to support the view. I would also point out that this contract as embodied in the letter of Manasse was signed by him *p.p.*, and there is authority for saying that in such a case a contracting party is put upon inquiry to ascertain what the agency is. I come to the conclusion that the defendant was not a party to this contract, and judgment must be given for the defendant with costs.

Solomon, J., said: It is quite clear that Manasse had no power to bind Kamp by the letter of the 29th July. He had no special power to do so, and it is equally clear that his position as manager gave him no authority to enter into such a contract. It seems to me altogether outside the scope of his authority. But even if it were assumed for a moment he had power to enter into a contract of that nature, I think the facts clearly show that Dittler had clear notice that Manasse had no such authority. Dittler himself admitted that he had been told to send the letter in question to Kamp. I am quite satisfied also that Kamp had no knowledge of these transactions until he went to Port Elizabeth, and that therefore he could not have ratified the contract. For these reasons I concur in giving judgment for the defendant.

[Plaintiff's Attorney, D. Tennant: Defendant's Attorneys, Messrs. Findlay & Tait.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

HOUGH V. VAN EYK. { 1898. Nov. 25th.

Married woman—Power of Attorney.

The plaintiff, who was married by ante-nuptial contract, shortly after the marriage gave a power of attorney to the defendant, an attorney-at-law, to receive a certain inheritance which was due to her. Upon her suing him some time subsequently for the amount the defendant alleged that she had authorised him by power of attorney to pay himself out of the inheritance certain sums which were due to him by her husband, but he failed to produce this power.

Held, *that the plaintiff was entitled to succeed.*

Held, further, *that even if proof of the plaintiff's consent were produced it would be necessary to prove also that she had had some independent advice.*

This was an action brought for the recovery of certain moneys alleged to have been collected by the defendant Henry van Eyk, on behalf of the plaintiff, Mrs. Hough. The declaration stated that the plaintiff lived at Wilgeboschkloof, in the division of Sutherland, and the defendant was an attorney, residing at the Paarl. Before her marriage an ante-nuptial contract between plaintiff and her husband was drawn up by defendant, and executed before him as a notary public, and registered in January, 1895. That contract provided that the parties thereto should not be liable for each other's debts, and that inheritances should belong to each other exclusively. In February, 1895, defendant received, on behalf of plaintiff, £241 6s. 1d., being a certain inheritance, with interest from February 15, 1895, at the rate of 6 per cent., which it was his duty to have paid, less 2½ per cent. as a fair and reasonable charge for collection, over to the plaintiff. The plaintiff claimed the said amount less 2½ per cent.

The plea admitted the execution of the ante-nuptial contract, and admitted the duty of the defendant to pay over the £241 6s. 1d. to the plaintiff, less a reasonable charge for commission, but said that the plaintiff's husband was indebted to the defendant for certain sums of money, and it was agreed between the parties in August, 1896, that the sum of £241 6s. 1d., less charges, should be credited in this account against the balance due by plaintiff's husband. The result was a balance to the debit of defendant of £11 2s. 11d., of which payment had been made to the plaintiff in full settlement and discharge of accounts between the parties.

Mr. Innes, Q.C. (with whom was Mr. Mc Gregor), for the plaintiff.

Sir Henry Juta, Q.C. (with whom was Mr. Gardiner), for the defendant.

The onus of proof of the special agreement between the parties having been laid on the defendant, the first witness called was

Henry Philip van Eyk, the defendant, an attorney of the Supreme Court, who deposed that he was now practising at the Paarl, but had formerly practised at Sutherland. He knew plaintiff and her husband before their marriage, and had had many transactions with the latter before that marriage. He drew up the ante-nuptial contract between plaintiff and her husband. Witness had collected for the plaintiff an inheritance of £246 6s. 1d., less Cape Town charges. In March, 1895, he had a meeting with plaintiff and her husband, and he then spoke to them about the husband's indebtedness to him. The two Cloetes were present during part of the interview. Plaintiff first said she wanted to buy sheep with the money, but afterwards said that as her husband had bought in nearly all the sheep at the sale witness had held she would assist him with her money, and gave witness authority to deduct her husband's indebtedness from her inheritance. As she had been married by ante-nuptial contract, witness drew up a small power of attorney authorising him to liquidate the debt with her money. Plaintiff signed that power, and the two Cloetes signed as witnesses. When a settlement was afterwards made, in October, 1896, witness handed all the papers back, and he was of opinion that the power was among them; but he might have lost it when he removed to the Paarl on February 11, 1897. Witness drew up a statement of Mr. Hough's indebtedness, and in October, 1896, in the presence of plaintiff and her husband, deducted that from the amount of the inheritance, leaving a balance in favour of the plaintiff of £11 2s. 11d. Plaintiff's husband then gave witness the receipt produced, and as he said he was needing money that day, and witness had done a lot of work for him, witness gave him an allowance, making the amount he received £15. The first time witness heard of plaintiff claiming the £246 was when he received the summons in the present case.

Cross-examined: Witness had suggested to plaintiff that she should assist her husband with that money, as he had bought the sheep. Witness had had books, but a clerk he had kept them in such a way that he could not make head or tail of them, and when the man left him, long before he went to the Paarl, he destroyed those books. In August, 1896, however, he had the books. Part of the plaintiff's inheritance had been used to extinguish a debt due by Mr. Hough's brother.

Frederick B. Moore deposed that he was formerly a clerk in defendant's office at Sutherland. Witness was present when the account was considered in August, 1896. It was gone through item by item, and then defendant told Mr. Hough to take it home and consider it, and mark the items he was not sure about. In October, 1896, plaintiff, her husband, Mr. Van Eyk, and witness were again together in the office, and the account was debated, every item being gone through. Witness decidedly understood from what was said that the inheritance was being deducted from the account. The plaintiff must have understood that. There was a balance of £11 due by defendant, and the latter at Mr. Hough's request made it a round sum of £15.

By the Court: It was explained to plaintiff that the inheritance was to be used to liquidate her husband's debts.

Cross-examined: At that time witness could not speak Dutch very well, but he understood a great deal. He had then been at Sutherland four months, but he had been there before. The conversation between plaintiff, her husband, and defendant was in Dutch. Hough signed willingly, and seemed very pleased with himself.

Daniel A. N. Jooste, now living at the Paarl, but who had resided at Sutherland for some years up to 1896, deposed that he had been for eighteen months in defendant's office, after which he was in business with a partner. The usual charge on inheritances was 5 per cent. on the net amount received. In October, 1896, plaintiff and her husband came into witness's shop and had with them the account produced. Witness went through the items one by one with Mr. Hough, and the latter said they were correct. Plaintiff could easily have overheard. Mr. Hough said the money set off against the account was Mrs. Hough's.

Jacob F. Cloete, a shopkeeper residing at Sutherland, corroborated the evidence of defendant and his clerk as to his being in defendant's office in October, 1896, when plaintiff and her husband were there, when they were settling up accounts. Plaintiff was doing all the business, Mrs. Hough simply looking on. Witness had had to pay 5 per cent. on an inheritance he received, after deducting the Cape Town charges.

Cross-examined: Beyond what he heard from Mr. Van Eyk, he did not know what the particular business was between plaintiff and defendant.

Adriaan J. Visser, farmer, living at Jackalsvlei, near Sutherland, deposed that he knew Mrs. Hough before her marriage, and knew when she was married. After her marriage he spoke to her about her money, and she said that she had helped her husband with her money, he having borrowed money. She mentioned the name of Mr. Van Eyk.

Cross-examined: It was in April, 1895, she spoke about her money. She did not say whether or not it was a large amount.

Nicholas P. Cloete deposed that he knew plaintiff and her husband very well. He had liquidated the estate of Mr. Hough's first wife, and knew a good deal about his affairs. After plaintiff's marriage, he remembered being in defendant's office and plaintiff and her husband coming in. There was a conversation about plaintiff's inheritance, and ultimately she gave defendant a power of attorney to pay over the money to Mr. Hough, in order to settle the debts between him and defendant. Witness and his son signed the power of attorney after the plaintiff. What she was doing was made clear to the plaintiff.

Cross-examined: Mr. Hough did not sign the power of attorney. Defendant read over the power of attorney to them.

Gert Cloete, a son of the last witness, gave evidence corroborating that of his father.

J. J. van Wyk said that the usual charge made at Willowmore upon the net amount of an inheritance received was 5 per cent.

This closed the defendant's case.

Christina Wilhelmina Hough, the plaintiff, said she was twenty-one years of age; she had never signed a power of attorney to pay her inheritance in account between her husband and the defendant. She had not signed any document in the presence of the Cloetes and had not authorised the defendant to bring any money into account. She had asked the defendant three times for her money. An account was brought to her but she was dissatisfied with it.

Cross-examined: She had never been in the defendant's office. She had signed the power to draw her inheritance in her uncle's house. She did not know Moore. She did not know that her husband owed money to the defendant.

Re-examined: She asked defendant four times for her money. He said there was a mistake in her father's name and she was to come back. The second time she asked he told her to wait till he had settled with her husband. The last time she asked him for the money he got angry.

J. H. Hough, the plaintiff's husband, said at the time of his marriage the defendant had business of his in hand and the plaintiff signed a power of attorney to receive her inheritance. The witness related several occasions upon which he and his wife had gone to settle about the inheritance and had been put off by the defendant. On the last occasion the defendant got angry and witness told plaintiff to leave it alone. He saw the defendant again but did not speak about the inheritance. In October, 1896, the plaintiff did not go with him to the defendant's office nor when the Cloetes were there. When he went with his brother he signed a receipt; defendant said he would make him sign. Witness said then he would sign, but he did not understand the account. He showed the account to Visser and then to Maritz. In May, 1897, Maritz died and witness got the papers and gave them to Marais. Moore wrote the document. Jacob Cloete was not there.

Cross-examined: He signed the receipt for the £15 he had received at the same time that he got the papers.

Franz Hough, brother of the last witness, said that in October, 1896, he went to the defendant's office with his brother. The defendant had an account; it was read over. His brother was at first afraid to sign the receipt, but the defendant said he need not be afraid. He then signed. He said he expected money. He said "Not only is my money gone but my wife's money also." The plaintiff was not there.

Cross-examined: In 1895 witness and his brother had a settlement at the defendant's office.

After argument by Sir Henry Juta,

De Villiers, C.J., said: The plaintiff, while a young girl of only seventeen years of age, married a man named Hough. Before her marriage an ante-nuptial contract was executed, by which community of property was excluded. This contract was duly signed by the parties and executed before the defendant. The plaintiff was assisted by Mr. Van Eyk, who is also an attorney-at-law. According to his account, not long after the marriage he obtained a power from her to receive the amount of an inheritance which was due to her. Nothing is said in that power about the defendant being allowed to pay himself, but he says that not long afterwards he obtained a power of attorney by which he was authorised to pay certain debts; this took place, according to his statement, early in the year 1895. The power is not produced; that is very much to be regretted, because so much would depend upon the terms of the power. The Cloetes do not agree upon the terms of that power. Now it would have been very important to have had its exact terms, seeing that by it this young woman was to deprive herself of every right which she would obtain under her marriage. Now, surely, if the Court is to hold that such a power was given, very much stronger evidence should have been forthcoming, and the evidence should have been to the effect not only that she consented to its being done, but that she had independent advice. Before Van Eyk accepted this power he should have told the young woman to get the advice of some independent person as to what she was to do. Under the circumstances of this case I do not think it is necessary to go into the conflict of evidence and determine what took place in 1896. I am not satisfied as to what took place early in 1895. Mr. Van Eyk may not have properly remembered the terms of the power. He is not quite sure as to its terms; that is more important than what took place in 1896. I am not satisfied that the plaintiff clearly understood that she was entering into a contract to pay moneys due by her husband for debts due before the marriage. The further point is what commission should be allowed. I don't think the evidence given is sufficient evidence of a general custom throughout the Colony to justify the amount charged. I think the amount offered in the declaration 2½ per cent. is sufficient. Judgment will be given for the plaintiff as prayed with costs.

Maasdorp, J., and Solomon, J., concurred.

[Plaintiff's Attorneys, Messrs. Walker & Jacobsohn; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hons. Mr. Justice MAASDORP and Mr. Justice SOLOMON.]

WIUM V. KRYNAUW AND ANOTHER. { 1898 Nov. 28th.

Mr. Innes, Q.C., made an *ex parte* application for a rule *nisi*, operating as an interdict, restraining the respondents from proceeding with the laying of certain pipes in a water-furrow. On November 2, judgment was given in an action in which the present applicant was the defendant and the present respondents the plaintiffs. In that case absolution from the instance with costs was given, the defendant consenting to the furrow in question being used by the plaintiffs for their ordinary water rights on condition that the pipes be laid according to a certain suggestion. *Krynauw and another* v. *Wium* (p. 281). It was now stated that the pipes were being laid in the furrow, and in such a manner as to deprive the applicant of his right to use the water.

After hearing Mr. Innes,

The Court granted a rule *nisi* calling upon the respondents to show cause on the 12th December why they should not be restrained from interfering with the free use by the applicant of the furrow in question, the applicant being willing to allow them to lay the pipes on his land in a line parallel with the furrow.

Postea (December 12th).

Mr. Buchanan appeared for the applicant.

Mr. Graham, Q.C. (with whom was Mr. Gardiner), for the respondents.

A report by Mr. Stewart, an engineer who had inspected certain pipes laid by the respondents in the furrow was read. This suggested that for a certain portion of the distance the pipes be laid parallel with the furrow, and then from Mr. Wium's house they could be laid in the furrow.

After Mr. Stewart had given evidence on the point, and counsel had been heard,

De Villiers, C.J., said: I think that both parties are somewhat to blame for not calling the attention of the Court at the time of the principal action to the difficulty which has occurred in regard to laying the pipes in the furrow, while the defendant required the furrow for the purpose of leading his water. If attention had been called to the difficulty the Court would undoubtedly have ordered those pipes to be laid parallel with the furrow, instead of in the furrow. But neither of the parties nor the Court contempleted the difficulty which has arisen. Taking the literal construction of the order the defendants simply obeyed the order and laid the pipes in the furrow from the point H to the point S, which runs along the line of the furrow. What the defendants ought to have done when the difficulty was made clear was to have stopped at once, and asked the Court to extend the order over the six weeks. But there seems to be ill-feeling between the parties and costs were incurred, and under the circumstances the Court is of opinion that each of the parties must pay their own costs. The Court will now discharge the rule on both parties consenting that the pipes shall be laid so as to run parallel with the furrow to Wium's house, and from there in the furrow to the point S, the plaintiffs to construct a furrow for the defendant in lieu of the portion of the old furrow utilised for the pipes. In the case of any dispute between the parties as to the laying of the pipes and construction of the furrow, the decision of Mr. Stewart to be final. No order will be made as to costs, and the time for the laying of the pipes will be extended for three months, from this day. It must be understood that arrangements will be made so that Mr. Wium can have his water in the meanwhile. The applicant not to be responsible for Mr. Stewart's charges.

Maasdorp, J., concurred.

[Applicant's Attorney, C. C. Silberbauer; Respondents' Attorneys, Messrs. Van Zyl & Buissinné.]

DU TOIT AND OTHERS V POTGIETER AND OTHERS.

1898.
Nov. 28th.
,, 29th.
,, 30th.
Dec. 1st.
,, 2nd.
,, 21st.
,, 23rd.
1899.
Jan. 9th.

Water-rights — Reasonable share — Diminution of stream — Unreasonable use by third party—Abatement—Damages.

The defendants who were upper riparian proprietors on the B. River, a public and perennial stream, diverted and used for purposes of irrigation sufficient water to cultivate their own farms, but by so doing deprived the plaintiffs who were lower proprietors, of the beneficial use of the water for domestic purposes and for stock. The defendants maintained that they did not use more water than they had been in the habit of using for a period of more than thirty years and upwards, but said that the water in the river had decreased in volume, owing partly to natural causes and partly to the action of the riparian proprietors immediately above the defendants themselves,

Held, *that the defendants used more than their reasonable share, and that if from any cause the river reached them in reduced volume but still in sufficient quantity to retain its character of a permanent stream, all the riparian owners should abate their use and share the benefits as before.*

This was an action for a declaration of rights as to the water of the Buffels or Vlei River, in the district of Oudtshoorn, £2,000 damages, and an interdict. The declaration was as follows:

1. The plaintiffs are registered owners of portions of the farm Langverwacht. The defendants, Solomon Theodorus Potgieter, Johannes Marthinus Saayman, Willem Nel, Jacob Solomon Kotze, Hermanus Lambertus Potgieter, Jan Hendrik Potgieter, Andries Johannes Lategan, Johannes Frederick du Toit, Susara Johanna Catharina Dorothea Lourens (born Potgieter), in her capacity as the executrix testamentary of the estate of the late Marthinus Johannes Lourens, and as his surviving spouse, Catharina Elizabeth Hermina Lourens (born Thomas), in her capacity as the executrix dative of the estate of the late Willem Johannes Lourens, and as his surviving spouse, and now married without community of property to Andries Hermanus Fourie, and assisted by him as far as need be, Andries Hermanus Kotze, in his individual capacity, and in his capacity as the general agent of his brother Johannes Christoffel Kotze, and acting herein on his behalf, are the registered owners of the farm Buffelskloof; the defendants, Solomon Theodorus Potgieter, Cecilia Johanna Potgieter (born Strydom), in her capacity as the executrix testamentary of the estate of the late Johannes Cornelis Daniel Potgieter, and also as his surviving spouse, are the registered owners of the farm Rietfontein, and the defendants Susara Johanna Catharina Dorothea Lourens (born Potgieter) in her capacity as the executrix testamentary of the estate of the late Marthinus Johannes Lourens, and as his surviving spouse, Catharina Elizabeth Hermina Lourens (born Thomas), in her capacity as the executrix dative of the estate of the late Willem Johannes Lourens, and also as his surviving spouse, and now married without community of property to Andries Hermanus Fourie, and assisted by him as far as need be, and Jacobus Ernest Potgieter are the registered owners of the farm Andrieskraal: these said defendants being hereinafter called the first-named defendants. The remaining defendants are registered owners of those portions of the farm Langverwacht not owned by the plaintiffs, and are joined formally for the purposes of the record. All the aforesaid farms are situated in the district of Oudtshoorn.

2. A public and perennial stream, known as the Buffels or Vlei River, which takes its rise above the farm Buffelskloof, was wont and accustomed before the grievances hereinafter complained of to flow over the farms Buffelskloof, Rietfontein, Andrieskraal, and Langverwacht in the respective order mentioned, and thence into the Oliphant's River, which is also a public and perennial stream.

3. The said farms are riparian farms upon the said public and perennial stream, and the plaintiffs as owners of the farm Langverwacht were and are entitled to have flow down to them in the said stream water for drinking and domestic purposes and for watering their cattle, ostriches, and stock, and were and are entitled to have a fair and reasonable share of the said water flow down to them in the said stream for the purposes of irrigation.

4. The said farms Buffelskloof, Rietfontein, and Langverwacht were granted on the 11th September, 1821, and the western portion of the farm Andrieskraal on the 15th July, 1841, and the eastern portion thereof on the 1st July, 1853, and thereafter and up to about the year 1880 the portions of the farm Langverwacht now belonging to the plaintiffs were fruitful, productive, and valuable lands, large vineyards and fruit orchards and large quantities of grain and other produce being continuously cultivated and irrigated by means of the water flowing in the said Buffels or Vlei River, and were capable of supporting, and did support, large numbers of cattle, ostriches, and stock.

5. Since the year 1880 the first-named defendants have been gradually extending the cultivation of their lands and increasing the number of their cattle, ostriches, and stock, and have planted large quantities of lucerne, and have made new furrows for leading out the water from the said river, and have en-

larged their old furrows, and have from time to time diverted, taken, and used more and more water from the said river.

6. Since the year 1880 and up to the present time the first-named defendants have wrongfully and unlawfully diverted and taken from the said river an unreasonable share and quantity of the water in the said river, and more than they were in law entitled to take, and they have during the dry and summer seasons between the said periods wrongfully and unlawfully diverted and taken all the water flowing in the said river, and claim the right so to do, and refuse to allow any water to flow down to the plaintiffs in the said river.

7. The said defendants have ever since the said date wrongfully and unlawfully polluted and injured the water of the said river by leading it through enclosures in which large numbers of stock and ostriches are continuously kept, and by leading it into land impregnated with saline and other noxious matter, so that such soakage as occasionally reaches plaintiffs, or some of them, is by reason of the premises so full of saline matter and pollution as to be unfit for the use of man or beast or for the purposes of irrigation.

8. By reason of the premises the plaintiffs have been deprived of water for drinking and domestic purposes, and for their ostriches and stock, and have lost certain crops, vineyards, fruit trees, tobacco, and grain, and their said portions of the said farm have become parched and dry, and the soil has become poisoned and unfertile and unfit for cultivation, and they have been prevented from cultivating the said lands, and from keeping cattle, ostriches, and stock thereon, and the plaintiffs estimate their loss and damage at the sum of £2,000.

Wherefore the plaintiffs claim :

(*a*) From the first-named defendants the sum of £2,000 as and for damages aforesaid.

(*b*) An order declaring that the plaintiffs are entitled to have flow down to them in the said river sufficient water for drinking and domestic purposes and for the watering of their cattle, ostriches, and stock.

(*c*) An order declaring that the plaintiffs are entitled to a fair and reasonable share of the water in the said river for the purposes of irrigation.

(*d*) An interdict restraining the said first-named defendants from diverting and taking more than their fair and reasonable share of the water in the said river, and restraining them from polluting the said water, or from using it in such a manner as to render the plaintiffs' share thereof unfit for irrigation or drinking purposes.

(*e*) Such further or other relief as to this Honourable Court may seem meet.

(*f*) Costs of suit against the first-named defendants.

The plea of the defendants Hermanus Lambertus Potgieter, Jan Hendrik Potgieter, Andries Johannes Lategan, and Cecilia Johanna Potgieter, the proprietors of three-quarters of Buffelskloof and of Rietfontein East, was as follows:

1. They admit the allegations in paragraph 1.

2. As to paragraph 2, they admit that the Buffels River is a public and perennial stream, but they say that the said stream rises on Crown land, thereafter flows over the farms Welgevonden, Kruis River, and Limerick in the order mentioned, and thereafter to and over the farms in the said paragraph mentioned, and thence into the Oliphant's River, and they say that the above-mentioned course has always been the course of the said stream, but they deny that there is, or has been, a continuous flow of the said stream throughout the whole year.

3. They admit that the said farms are riparian farms, and that the plaintiffs as owners of the portions of the farm Langverwacht, situate upon the course of the said stream, are entitled, subject to what is set forth hereafter in this plea, to have flow down to them water of the said stream, for drinking and domestic purposes, and for watering their cattle, ostriches, and stock and a reasonable share of the water of the said stream for the purposes of irrigating.

4. The plaintiffs' farm is also a riparian farm upon the said Oliphant's River, a perennial stream, and the owners thereof, to wit, the plaintiffs, and their predecessors in title are entitled to use, and have always used, a substantial share of the water of the said stream for domestic purposes, for the watering of cattle, ostriches, and stock, and for the purposes of irrigation.

5. They admit that the farms named in paragraph 4 were granted as therein set forth, and they crave leave to refer to the grants thereof; and in respect of the other allegations therein they crave leave to refer to such proof as the plaintiffs may produce, and say that such of the plaintiffs as are riparian owners upon the Buffels River have always had the use of a reasonable share of

such water as from time to time has been flowing in the said stream, and they deny that they (the defendants) have made an unreasonable use of the said water.

6. For a period far longer than the period of prescription certain dams have been in existence in the channel of the said stream upon the farms Buffelskloof and Rietfontein, the property of the defendants, and by means of these dams there has been collected during the dry season of the year all water flowing aboveground in the said channel. A certain quantity of the said water so collected has been used for purposes of irrigation and otherwise by the defendants and their predecessors in title, and they have allowed the "afloop" or surplus water thereof to run back into the channel of the said stream or on to the lower riparian farms: the remainder of the said water so collected has flowed down for the use of the lower riparian farms.

7. Notwithstanding the user as aforesaid by the defendants there has at all times been water flowing in the channel of the said stream upon the plaintiffs' farm Langverwacht; the water so flowing over the said farm, together with the water flowing down thereto, as in the last paragraph set forth, has always been freely used by the plaintiffs or their predecessors in title, and is a reasonable quantity of the water of the said stream.

8. They deny the allegations in paragraphs 5, 6, 7 and 8 save that they admit that they have kept and do keep stock and ostriches in inclosures through which the water of the said stream is led, but they deny that any pollution is caused hereby, or noxious matter injurious to the plaintiffs: they say that any saline matter contained in the water of the said stream flowing down to plaintiffs is caused by the nature of the soil through which the said stream flows.

9. They especially deny that since 1880 they have made new dams in the said stream or increased the cultivation upon their said farms; but they say that the owners of the farms Welgevonden, Kruis River and Limerick have since the said year largely increased the cultivation upon the said farms and have used more water of the said stream than prior to that year; and in times of scarcity there is not sufficient for the use of the defendants for domestic purposes, for watering of their cattle and stock, and for purposes of irrigation.

Wherefore they pray that the plaintiffs' claim may be dismissed with costs.

The plea of the defendants Willem Nel, Jacob Solomon Kotze, Johannes Frederick du Toit, Catharina Elizabeth Hermina Louwrens, as executrix of the late Willem Johannes Louwrens, Jacobus Ernst Potgieter, Andries Hermanus Kotze, Johannes Christoffel Kotze, and estate of the late Marthinus Johannes Louwrens, owners of Andrieskraal and one-fourth of Buffelskloof, was as follows:

1. They admit the allegations in paragraph 1.

2. As to paragraph 2, they admit that the Buffels River is a public and perennial stream, but they say that the said stream rises on Crown land, thereafter flows over the farms Welgevonden, Kruis River, and Limerick in the order mentioned, and thereafter to and over the farms in the said paragraph mentioned, and thence into the Oliphant's River, and they say that the above-mentioned course has always been the course of the said stream, but they deny that there is or has been a continuous flow of the said stream throughout the whole year.

3. They admit that the said farms are riparian farms, and that the plaintiffs as owners of the portions of the farm Langverwacht, situate upon the course of the said stream, are entitled subject to what is set forth hereafter in this plea to have flow down to them water of the said stream for drinking and domestic purposes, and for watering their cattle, ostriches, and stock, and a reasonable share of the water of the said stream for the purposes of irrigation.

4. The plaintiffs' farm is also a riparian farm upon the said Oliphant's River, a perennial stream, and the owners thereof, to wit the plaintiffs and their predecessors in title, are entitled to use and have always used a substantial share of the water of the said stream for domestic purposes, for the watering of cattle, ostriches, and stock, and for the purposes of irrigation.

5. They admit that the farms named in paragraph 4 were granted as therein set forth, and they crave leave to refer to the grants thereof; and in respect of the other allegations therein, they crave leave to refer to such proof as the plaintiffs may produce, and say that such of the plaintiffs as are riparian owners upon the Buffels River have always had the use of a reasonable share of such water as from time to time has been flowing in the said stream, and they deny that they (the defendants) have made an unreasonable use of the said water

6. They deny the allegations in paragraphs 5, 6, 7, and 8, save that they admit that they have kept and do keep stock and ostriches in inclosures through which the water of the said stream is led, but they deny that any pollution is caused thereby, or noxious matter injurious to the plaintiff; they say that any saline matter contained in the water flowing down to plaintiffs is caused by the nature of the soil through which the said stream flows.

7. They especially deny that since 1880 they have made new dams in the said stream or increased the cultivation upon their said farms: and they say that in times of scarcity there is not sufficient water in the said stream for the use of the defendants for domestic purposes, for watering of their cattle and stock, and for purposes of irrigation; and they say the user by them has been such as it has been for thirty years and upwards.

Wherefore they pray that the plaintiffs' claim may be dismissed with costs.

The defendants Solomon Theodorus Potgieter (owner of Rietfontein West) and Johannes Mattheus Saayman (owner of portion of Buffelskloof), filed a separate plea similar to that of the owners of Andrieskraal. The other defendants were unrepresented.

Mr. Innes, Q.C., and Sir H. Juta, Q.C., appeared for the plaintiffs.

Mr. Seale, Q.C., and Mr. Jones appeared for the owners of three-fourths of Buffelskloof and of Rietfontein East.

Mr. Graham, Q.C., and Mr. Jones appeared for the owners of Andrieskraal and one-fourth of Buffelskloof.

Mr. McGregor appeared for S. T. Potgieter and J. M. Saayman.

Paul Stephanus Fouchée and Jacobus Ernst Louwrens, purchasers of the share in Andrieskraal and Buffelskloof of the estate of the late William T. Louwrens, were joined as defendants on the application of Mr. Innes, they consenting on condition that they should be held to have filed a plea similar to that of the defendants represented by Mr. Graham.

For the plaintiffs the following evidence was given.

Andries Jonathan Lategan, farmer, residing at Gamka, in the Oudtshoorn district, stated that he was fifty-five years of age and was born and brought up on Jan Fourie's Kraal, close to Langverwacht. He had known the farms there ever since he was a child. When he first went to Langverwacht it had a good supply of water. It was then owned by five persons, and had large lands, vineyards, orchards, &c., and supported large numbers of stock. It was one of the best farms in the district, and the farmers were the wealthiest. It was now like a deserted place, and if things remained in their present position it would be impossible to continue cultivating it. It was since the action in the Circuit Court, about twenty years ago, that the place had begun to go back. There was a portion of the farm on the Oliphant's River, and leaving out that portion of the farm everything had dried up Witness had for years tried to get a friendly settlement of this matter. In April, 1895, witness and Mr. Nel, at the request of the owners, made an inspection of the farm. A meeting was held, at which the owners of all the farms in question were present, and the inspectors' report was read to the meeting. After some discussion as to giving Langverwacht a share of the water, a majority voted against the proposal of the plaintiff that the matter should be decided by arbitration. There were also majorities against preposals that the water should be allowed to run to Langverwacht from Sunday evening to Monday evening, or that sufficient water be allowed to run continuously for drinking purposes. In his report witness had said that the condition of things at Langverwacht was intolerable. That was so. The water he found at Langverwacht in 1895 was unfit for drinking. In 1897 an action was brought by the owners of Andrieskraal against the owners of the upper farms, but a settlement was ultimately arrived at by which the owners of Buffelskloof agreed to allow the water to run free and unhindered to Andrieskraal for twenty-four hours per week, and the owners of Rietfontein agreed to allow it to run for thirty-six hours per week. The owners of Andrieskraal gave up several servitudes. Witness had tried to get the owners of Andrieskraal to give some of the water to Langverwacht, but was unsuccessful. If there was any stream at the drift on the vlei river it was a very small one. Perhaps two or three times a year there would be a little water there. About a third more of Andrieskraal was now under cultivation than there was thirty years ago. That had been effected by a furrow being taken out higher up. Witness gave evidence as to the increased cultivation since 1880 on the other upper farms, and also as to increased number of stock kept there. He was of opinion that water could be spared for Langverwacht. Witness gave further evidence as to visits he made to the farms, finding them all, with the exception of Langverwacht, supplied with water.

In cross-examination, the witness stated that, except in particularly good years of rain the river was dry for three months in the year, except in certain parts. The plaintiff had bought most of the portions of Langverwacht owned by him since 1880. Andrieskraal had not got enough water for itself in the dry season. Witness would be surprised to hear that from analysis made of water on Andrieskraal it was salter than the water on Langverwacht. He had tasted both waters, and the water on Langverwacht was as salt as brine.

Stephanus Josias Terblanche stated that the water on plaintiff's farm was unfit for man or beast. Witness gave evidence as to the dried-up condition of the farm now. There were a number of houses on the farm, but most of them were uninhabited. Previous to 1880 the farm was a good one. There used to be a mill on the place, but there was no water for that now. There was no water now for ostriches or cattle. There were a few cattle on the farm, but they were in poor condition. The water on Andrieskraal was not good, but still it was much better than that on Langverwacht. There was cultivated land on Andrieskraal, and a fairly good vineyard. The farm had water for cultivation. Rietfontein also had water for irrigation purposes. There were about 900 ostriches on that farm. Buffelskloof also had plenty of water. He also described the condition of Langverwacht on another visit he paid to the farm in November.

Cross-examined: A week before he visited the farms the first time there had been a little rain. He did not go to Rietfontein and Buffelskloof last Monday when asked to do so by one of the owners, because he knew there would be no water there. Mr. Potgieter had told him so. Witness knew water was now scarce in the district. He knew that very often on Rietfontein the water was very weak. The farmers on the lower portions of the small rivers in the district had suffered this year. If Andrieskraal only yielded 40 muids of grain, that would be a small crop, but it ought to give more, as he knew it was a good farm. Witness's farm was about an hour from Langverwacht, and for three years he had had no water. His farm was on another river. On fairly watered ground the sowing of a bag of seed would yield about 30 muids of wheat. A bag would be sufficient to sow a morgen and a half of ground.

Re-examined: There was very little grain-farming in the Oudtshoorn district. It was mostly ostrich-farming and lucerne growing that was carried on. At Andrieskraal and Rietfontein there was a large quantity of lucerne grown.

[After the first two witnesses had given their evidence the Chief Justice left the bench and the remainder of the case was heard by Maasdorp and Solomon, J.J.]

Christoffel Kotze, a farmer, stated that he was fifty-eight years of age, and had been brought up on an adjoining farm to Langverwacht. He gave evidence as to the fine condition of the farm years ago, and as to its condition now. On the other farms the area under cultivation had been increased. There was much more lucerne grown. Unless the whole of the water flowed down, according to a servitude, it would be of no service to Langverwacht. He had lived on Rietfontein for seven years previous to 1880, and had always got a turn of water for four days, and had let the water flow below him for four days also.

Cross-examined: The stream was not big enough to divide. Seven years before the lawsuit of 1880 water used to be let down to Langverwacht when the owners of that farm came up and said that they had no water. That was done many times. Witness could not say how often. Even now Andrieskraal did not have enough water to cultivate the land there. At present water was scarce there, and there was not enough to cultivate one-third of the land.

Re-examined: Before the lawsuit of 1880 Langverwacht claimed the water as a right.

Adam de Smidt, a member of the Legislative Council for the Circle in which Oudtshoorn is included, said he was fairly well acquainted with the district in question in this case. He knew Langverwacht before 1879. It was then in a good state of cultivation, but now it was a waste. When there recently he saw a small stream of water, but not sufficient for irrigation purposes. He had also passed Buffelskloof and Rietfontein. These two farms were well cultivated, had beautiful trees, and fairly good houses. It had been raining a few days before he went there, and so there was a quantity of water. On Buffelskloof he thought there was a greater extent of land under cultivation than between 1864 and 1879.

Cross-examined: There did not appear to be more cultivation on Andrieskraal than in 1879. He could not say Andrieskraal appeared to be using an excessive amount of water.

Johannes Matthys Potgieter, Lucas Potgieter, and Johannes Jacobus du Toit, one of the plaintiffs, gave evidence.

Jacobus Marthinus Bernhardus Steyn deposed that he was brought up on the farm Rietfontein, and had for the last fifteen years resided on Langverwacht. Witness got his drinking water from tanks, and when these gave out he got water from a fountain alongside the Oliphant's River. Since July, 1897, Langverwacht had had no water from the Vlei River. In that month water came down from Kruisrivier and Buffelskloof for eight days, of which Langverwacht got three days and a half.

Cross-examined: There were many farms in the Oudtshoorn district where the water was brack.

Abraham Stephanus du Toit stated that he was born on Langverwacht in 1853, and lived there until 1897. Previous to the lawsuit of 1880 they had used the water in the Vlei River on Langverwacht in turns, of four days out of twelve. Witness had often, when the water was scarce, gone up the river, and given notice to the upper proprietors, and the water had then been allowed to come down. After 1880 they did not get their turns, and Langverwacht, which at that time was a good farm, had gone back since, and was now worth nothing. Before 1880 they could use the water for domestic purposes, but it had begun to get more and more brackish since then.

Cross-examined: When witness left Langverwacht he sold his portion of the farm. He received £1,325 for his portion. A few years before he could have got over £2,000 for his share of the farm. There were 160 morgen of ground, between forty and sixty morgen of which were cultivable. He sold his portion of the farm because he could get no crops.

This closed the case for the plaintiffs.

For the defence,

Willem Gerhardus Olivier, a farmer, stated that he was a brother to one of the defendants, Solomon Potgieter, and also of the Kotzes. Witness was acquainted with the farms in question, and from 1864 to 1872 had farmed on Buffelskloof. Since then he had often visited the farms. Before that witness had farmed there for his father-in-law. Up to 1880 witness had never heard of any four days' turn of the water with Langverwacht. There were about four morgen more cultivated on Buffelskloof now than there were in 1880. There was about one-third more land under cultivation on Rietfontein. That farm suffered more from the want of water than any of the other farms. It was the only farm that had no *uitslag* except a small amount on the lower part. It would require a very strong stream in the river for the water to reach Langverwacht. Up to 1885 there used to be a strong stream, but part of the bed of the river was washed away by floods of 1885, and the water did not then flow down to Langverwacht. Since the compromise in 1897 Andrieskraal had benefited little by the Sunday water, the *uitslag* water being used in addition. The stream, however, was too weak to reach Langerwacht. The water at Rietfontein was very weak. In 1896 and 1897 all the farms had water. The water of the river was brack before 1880. That was on account of the nature of the soil. Brack places would be found on farms away from the river. Witness had never heard of ostriches making the water of the river brack. It was impossible for Rietfontein, Andrieskraal, and Buffelskloof to spare any water for Langverwacht.

By the Court: He meant that for the greater portion of the year those farms could not spare the water.

Examination continued: Before the rains in October last Potgieter had to dig a hole in the river for the purpose of getting drinking water for Rietfontein West and East.

Cross-examined; Buffelskloof, Andrieskraal, and Rietfontein now went in mostly for growing lucerne. In the old days if witness got one watering for his ploughing and another for his crop that was sufficient. He could not say how much watering the lucerne crops on those farms now got. In August last year Buffelskloof and a large portion of Rietfontein were in good condition, although at the same time Oliphant's River farms were dry. Andrieskraal was not so good. Ostriches did not make a camp dirty. They were the cleanest animals there were.

By the Court: The water at Langverwacht was at one time good. Latterly there was a scarcity of water at Langverwacht. That was entirely the fault of Kruisrivier, which had greatly increased its cultivation. Rietfontein used more water, but that had nothing to do with Langverwacht getting less.

Hendrik Petrus Thomas, formerly a part owner of Buffelskloof, said he had for thirty-two years resided on that farm, with exceptions of periods spent on Rietfontein. Before 1880 Langverwacht never had a four days' turn of the water from Buffelskloof. It had four days from Rietfontein. Witness could not say whether the water was given as a favour or a right. In 1880 there was very little ground that could be cultivated. On Kruisriver the area under cultivation had doubled. Witness believed that they had less water on Rietfontein now than they had in 1880. Buffelskloof also had less water. When witness was last there he found long stretches of the river bed with no water in them. There was one stretch of 1,500 yards without water. The river bed had altered since 1885, having been washed out by floods. Since the vleys on Kruisriver had been cleared, less water came down to the lower farms.

Cross-examined: Langverwacht was quite dry. Lucerne was largely cultivated now. That required more water than the crops that used to be grown in witness's time.

Re-examined: Witness believed that the servitude sluit from which Andrieskraal got water was made in 1879 and 1880. Witness would not say Lucerne crops required more water than wheat crops.

Edwin Thomas Leach Edmeades, Mayor of Oudtshoorn and a member of the Oudtshoorn Divisional Council, deposed that his wife formerly owned a part of Buffelskloof Witness was well acquainted with the farms in question, and had himself farmed Buffelskloof. A little over a year ago he inspected the farms. During the time witness farmed Buffelskloof, from 1885 to 1893, he had difficulty in getting water. All the years he was there, with the exception of two summers, every year the water ceased to flow in the river. In that district the farms caught all the water they could get in their dams, and the lower farms got the "afloop" water from the higher farms. When there was a lot of rain, water naturally ran into the river. If they had a good winter with plenty of rain, the upper farms would be able to cultivate all their land, and then when the dry season came, the lower farms would benefit by the water percolating through the soil. They would thus be better off if a dry season followed than the upper farms. There were only about ten acres more under cultivation now on Buffelskloof than when witness first went there. On Rietfontein hundreds of morgen less were cultivated than at that period. That was on account of want of water, be cause the last six or seven years had been exceptionally dry. The cultivation of the lands on the western side had, with the exception of a small part, been abandoned when witness was there last year. On the eastern side cultivation had been abandoned two years ago. When witness was last there he found large stretches of the river-bed bare. The cultivation on Kruisriver had increased since 1895. In 1890 witness had owned a portion of that farm, and he himself had brought more land under cultivation. Witness thought Rietfontein was the driest of the farms. Not much use could be made on a big farm like that of the few inches of "uitslag" water. Except for occasional thunderstorms there would be no flow of water in the summer season. It was not possible to divide the stream equally and at the same time keep the cultivation going on the farms. Witness had absolutely no interest in this case.

Cross-examined: If less land were irrigated on the upper farms the water might be divided and Langverwacht be able to irrigate a little more. Witness's farm on the Kamnassie was above that of the Fouries, and he took all the water he could get. That was the custom of the country. He supposed the Fouries did not like it; he would not if he were in their place.

Petrus Jacobus Claasen, residing at Jan Fourie's Kraal, in the Oudtshoorn division, said that he was sixty-nine years of age, and was well acquainted with all the farms in question, he having been one of the arbitrators who divided a number of these farms. At the same time he apportioned to each owner his use of the water. Witness detailed the condition of affairs with regard to water at the time of the case in 1880. There was less "uitslag" water now on Langerwacht than at that time, but there had been a great drought. The sluits had been shifted from place to place on Rietfontein, but owing to the drought they could not sow there as formerly. There was no water to spare to Langverwacht except after heavy rains. The water on witness's farm was as brack as that on Langverwacht.

Cross-examined: Before 1880 good crops were raised on Langverwacht, and there were vineyards, &c. It then had as much water as Rietfontein and Buffelskloof put together. On November 9 and 10 last he visited Langverwacht. There was a little water there, but not fit to drink. Witness saw no cultivation of vineyards there at that time. Buffelskloof then presented a very pretty picture, with houses and land worked wherever it could be worked. There had been a heavy drought along the Oliphant's River On Rietfontein he found fair lands. Part of the sowing lands was in fair condition and part dried up. There were lucerne fields, but the lucerne was rather short. He also saw crops and lucerne lands on Andrieskraal. Kruisriver used the water in 1880 in the same manner as it did now, but more land was cultivated on Kruisriver.

Andries Hermann Mulder stated that he was a member of the Divisional Council of Oudtshoorn. He knew Langverwacht twenty years ago; at that time the water onLangverwacht was also very brackish, in fact so much so that coffee made from it could not be used. When his father used to visit his sister on Langverwacht he always took water with him, as that on the farm could not be used. In November last, with a few others, he had made an inspection of the farms in question. He measured the stream and found that the two farms higher up, called Welgevonden and Kruisriver, had most of the water that came from the mountain and Buffelskloof only got what was left.

Hermanus Albertus Potgieter, one of the defendants, and other witnesses, gave further evidence for the defence.

Charles Barnabas Blore stated that he had been in the district in question for twenty-five years. In 1885-86 he surveyed the farm Kruisriver. There were then 275 morgen under cultivation. He had made a recent survey, and found that there were 420 morgen now under cultivation. He had also surveyed Limerick recently, and found forty-eight morgen under cultivation. On Rietfontein, when he surveyed it in 1880, he found 435 morgen under cultivation. He could not say if the arable land on Langverwacht had increased since 1880. The river frontage on Kruisriver was six miles, on Limerick about two miles, on Buffelskloof a little under five miles, on Rietfontein a little over five miles, on Andrieskraal about two miles, and on Langverwacht about three miles. He had prepared the plan put in.

Cross-examined : Witness's plan was compiled from actual survey of Kruisriver and Limerick this year, and Rietfontein in 1880. Andrieskraal and the portion of Langverwacht in the plan were compiled from Adley's plan.

Dr. Marloth, professor of chemistry, residing in Cape Town, gave evidence as to having analysed certain bottles of water brought to him by Mr. Lind. His report was put in.

Andries Johannes Lategan, proprietor, together with the Kotzes, of one-fourth of Buffelskloof, deposed that he had taken samples of water from the river. One sample was taken from Langverwacht about 1,000 yards below the upper boundary. That was on November 21. On the same day he took samples from Langverwacht's dam, on Andrieskraal. These bottles were labelled, and he took them with Mr. Lind to Dr. Marloth. He resided twelve years on Buffelskloof. They were often badly off for water on the farm. For three successive years they had had no water from the river. Witness saw no chance of dividing the water on Buffelskloof so as to give Langverwacht a share. There was much less water in the river than in 1880. That was partly due to the severe drought. Kruisriver moreover took more water than it did eight years ago.

Cross-examined : Witness had brought no sample of Buffelskloof water with him. They had never formally complained about Kruisriver taking too much water.

Johannes Hendrik Roux deposed that he had lived in the district in question from 1850 to 1879. Before 1880 the owners of Langverwacht on one occasion came and asked old Mr. Potgieter for water when he was leading, but the latter refused. The water was sometimes allowed to flow down to Langverwacht when the owners asked for it, but that was done as an act of grace, and not because Langverwacht had a right to the water. He gave corroborative evidence as to the scarcity of water on the farms there, and as to the increased cultivation on Kruisriver. There was brack water on Langverwacht before 1880.

Christian Michael Lind deposed that he took certain bottles of water to Dr. Marloth, which had been taken from the river by Potgieter and Lategan. A bottle of water from a well in the village was also taken by witness to Dr. Marloth, as also some soil given him by H. L. Potgieter.

Hermanus Jacobus Redelinghuys, a farmer in the Oudtshoorn district, said he was well acquainted with the Buffels River and the farms along it. He had inspected Andrieskraal on a number of occasions, and with the exception of one occasion immediately after rain, and had always found water scarce, there never being more than 2½ inches in the sluits. The bed of the river had changed since 1885, but he would not say that would stop the water. There was a big flood in 1885. Andrieskraal had not as much water now as it had in 1880. They could cultivate with six inches of water, but they could not do much with that. If they had a good enough season to bring down the water five or six times in the year it would reach Langverwacht.

Cross-examined: He meant it would reach Langverwacht if it were not turned off at Rietfontein. The furrows at Rietfontein and Andrieskraal were quite sufficient to take all the water of an ordinary freshet. He had made his inspections at the instance of the owners of Andrieskraal. Mr. Louwrens fixed the days for the inspection. On occasions when he went there he found water being led on Buffelskloof and Rietfontein, while there was very little water on Andrieskraal, but if Buffelskloof and Rietfontein had allowed the water to come down there would have been a lot of water on Andrieskraal. He did not hold with the theory that the more water taken out of the river higher up, the more "uitslag" water flowed into the river lower down. Buffelskloof and Rietfontein looked in fine condition when witness was there in August last. Andrieskraal did not look so well.

Lewis Matthys Steyn stated that he had been residing at Andrieskraal for twenty-eight years. There were three dams on that farm, which were there in 1880. There was also another dam, the servitude one. Andrieskraal was in poor condition this year. He, personally, had only sown one bag of oats and one of wheat. He supposed on the whole farm there were only about ten or eleven muids sown. In 1880 they had more water and much more was sown. At Andrieskraal the river was dry in some places for 800 yards. The "uitslag" water was weaker than it was in 1880. With the Sunday water he now got he could irrigate about one-half his land when it came down. Witness had lost about 100 ostriches since 1897. On the whole farm between 300 and 400 ostriches had been lost. Mr. Du Toit (the plaintiff) had wished to join witness in the previous action against Buffelskloof and and Rietfontein. No complaint had ever been made by the owners of Langerwacht as to Andrieskraal getting more than its share of water.

Cross-examined: No new sluits had been made on Andrieskraal since 1880. The servitude furrow had been made in 1878.

Re-examined: With the exception of the Sunday water witness had used the water in the same manner as he now did ever since he could remember.

Petrus Jacobus du Toit said that he was forty years of age, and had lived on Andrieskraal all his life. They had now less water than in 1880. They had increased the cultivation very little since then, between three and four morgen. The last time the water in the river had reached Andrieskraal was a year ago. Last year only about ten or twelve muids had been sown on Andrieskraal. There was less "uitslag" water than there was in 1880, and the quality was bad. They got their drinking water from the mouth of the dam higher up the river.

Cross-examined: They took all the flood-water if they required it. They had done so for more than thirty years. Witness remembered the action he had brought last year. There was a talk of Langverwacht joining them. If that had taken place, he would not have been content with thirty-six hours' water as at present. When he said it was a year since he had water on Andrieskraal, he meant that was the last freshet they had. He had led water many times since then, but not a strong stream.

Re-examined: Witness could not say how often there had been a continuous flow in the river itself this year. It had never reached him.

This closed the evidence for the defence.

Postea (December 21st and 23rd).

Argument was heard.

Mr. Innes: This action is brought to enforce the common-law rights of the plaintiffs. The titles of Buffelskloof and Rietfontein contained conditions as to the use of the water for four days each, and in 1880 the Court held that Andrieskraal was not entitled as a neighbour to a four days' turn. *Nel and another* v. *Potgieter and others* (Buch. App. Ca. I., p. 22). But the grants of the upper farms do not take away the common-law rights of Langverwacht, and the only question is whether they have been taken away by prescription. It was never contended by the defendants in 1880, that they were entitled to take all the water of the stream, but they appear to have considered that the judgment gave them that right, and since then they have increased their cultivation. It is not only in dry seasons but in good seasons also that Langverwacht is left waterless. Buffelskloof takes all the water in dry seasons. When freshets come down, Rietfontein and Andrieskraal with their large furrows take it all.

[Solomon, J.: Why was not Kruis River joined as a defendant?]

It is not well to have too many farms before the Court, and it was thought that if the plaintiffs obtained judgment against Buffelskloof, they could make terms with Kruis River. Some of the owners of Buffelskloof are also part owners of Kruis River. We do not ask the Court to say how many hours of water-leading we are entitled to, but we ask for a declaration as to what is a reasonable share.

The first plea is not really a plea of prescription. The allegation that the defendants do not take more water than they formerly did, but that the plaintiffs do not get as much as they got formerly on account of the increased cultivation on Kruis River is an untenable position to take. *Van Schalkwyk* v. *Hauman* (7 Sheil, p. 195) is entirely against it. If a good plea, the defendants should have gone further and pleaded in abatement, compelling a joinder of the upper proprietors.

[Solomon, J.: If it is proved that Andrieskraal gets very little water, can you claim damages against it?]

We may not be able to claim much damage, but our right to a declaration of rights will not be affected. As to the plea of prescription, it has not been proved that the water has been used for thirty years as it is being used now. There has clearly been a different user since 1889; prior to that year the state of things which now exists never did exist. The principal unreasonable user by Andrieskraal and Rietfontein is when there are freshets. We are entitled to a declaration of rights and an interdict.

[Maasdorp, J.: It is not usual to grant an interdict in these cases.]

I do not press for an interdict. We have sustained substantial damages.

Mr. Searle: This case is clearly distinguishable from *Van Schalkwyk* v. *Hauman*, in that in times of scarcity the stream is not sufficient to reach Langverwacht if a reasonable share is used by all the upper proprietors, and in times of plenty Langverwacht gets its reasonable share. There is no law which can deprive an upper proprietor of all the water; it has never been so held.

[Solomon, J.: Do you say the upper proprietor has the right to divert water for purposes of irrigation if that does not allow lower proprietors sufficient for irrigation?]

I contend that is the law. *Nel* v. *Potgieter* (1 Buch. App. Ca., p. 22) at p. 24.

[Solomon, J.: Is not that assuming that there was sufficient for the lower farms?]

There was no evidence called there to show that that was so: from the evidence given it was clear that Rietfontein was not allowing any water to go down to Langverwacht. No declaration of right can be given where the whole of the water is blocked off by upper proprietors who are not joined. It is admitted that this is a perennial stream, but a perennial stream is not necessarily a stream which is always flowing, and the stream is not always capable of common use. The only *dictum* at all in conflict with this view is that by Buchanan, J., in *Van Schalkwyk* v. *Hauman* (at p. 199). In that case it was found as a fact that the stream did reach the lower farm: in this case it does not if the upper proprietors take their reasonable share. Most of the witnesses agreed that there was no practical scheme of division which would benefit Langverwacht if the upper farms took a reasonable share. The evidence given for the plaintiffs as to the four days user by Langverwacht before 1880 is vague. There has been no practical increase of cultivation on Buffelskloof and Rietfontein since 1880, on Rietfontein there is less than there used to be: land formerly cultivated has been abandoned; Coetzee does not grow enough wheat for his own sustenance. The Court cannot do justice between the parties unless Kruis River is joined, without that the fair and reasonable share cannot be decided on.

J. J. du Toit is practically the only one of the plaintiffs who farms on the Buffels River, and the only one who has proved damages, but he was by his agreements at three different dates a party to the use of all the water by the defendants in the way they are using it. He was a part owner of Andrieskraal, and party to the action brought in 1897 against the upper farms and a party to the compromise. Though he did not sue on behalf of Langverwacht he was acting on behalf of both farms, and the compromise is significant as showing that he was content with what he got under it as being a reasonable share.

Mr. Graham: Our plea is not really a plea of prescription; we say that we have only used a fair and reasonable share and that the user has been the same for thirty years as it is now; if that is so the Court will not hold it to be an unreasonable user. Andrieskraal does not at present get enough water for its own needs: it is understocked; if all the water that it gets were allowed to flow it would not reach Langverwacht. Du Toit is estopped now by having been a party to the compromise. As to Buffelskloof, Mulder found that 37 inches of water flowed on to the upper boundary of Kruis River; if that were equally divided among the six farms each would get 6 inches. Mulder found that in fact only 5½ inches flowed in to Buffelskloof.

Mr. McGregor: The persons who abstract most of the water are not before the Court. The plaintiff Du Toit by taking water for Andrieskraal is himself a contributor to the state of things which he complains of. The Court will not enforce the doctrine of reasonable use where the water is not sufficient to reach the lower farm. That doctrine if applied in such a case might result in ruining the upper farm without affording any material benefit to the lower. In *Van Schalkwyk* v. *Hauman* the upper proprietors did not take all the water and in that case, moreover, the action was brought against the real tort-feasors.

[Maasdorp, J.: What construction do you put upon the paragraph of the plea which mentions thirty years?]

A certain character attaches to water which has been flowing for that time independently of prescription. Buffelskloof is subdivided and held by separate titles. Saayman is not mentioned anywhere as a tort-feasor. Solomon Potgieter has not been shown to be a tort-feasor: he suffers himself from scarcity of water, It was said in *Viljoen* v. *Hamman* (7 Sheil, p. 240), that the damage should be fixed upon each individual.

Mr. Innes: All the owners of the upper farms in question are in the same position; they use the same dams, and the same furrow, and divide the water amongst themselves. It would be almost impossible to show the different use of each owner, As none of the defendants have shown that they did not join in the common use of the water, they must all be looked upon as one proprietor.

[Maasdorp, J.: Is not J. J. du Toit barred by the compromise of 1897, by which he consents to the use of all the water by the upper farms and Andrieskraal at certain times?]

That was a compromise, and does not admit the right of the upper proprietors to the balance of the water as against Langverwacht; moreover, it was not pleaded. The defendants say that the stream is not capable of being put to common use: if so. it is not a public stream *Van Heerde* v. *Wiese* (1 Buch. App. Ca., p. 5). But they admit that it is a public stream. The moment it is admitted that a stream is perennial and capable of division the upper proprietor is entitled only to a *pro rata* share. The only logical way of dividing the water is by turns. What is a just and reasonable share has never been decided, but a division by hours would give it in this case

Postea (January 9th, 1899).

The Court delivered judgment.

Maasdorp, J., said: The plaintiffs in this case, who are owners of portions of the farm Langverwacht, through which a perennial stream known as the Buffels River flows, sue such of the defendants as are owners of the farms Buffelskloof, Rietfontein, and Andrieskraal, situated high up upon the same stream, in an action for damages and for a declaration of rights. It is alleged in the plaintiffs' declaration that a public and perennial stream, called the Buffels River, rising above the farm Buffelskloof, flows through the farms Buffelskloof, Rietfontein, Andrieskraal, and Langverwacht, which are situated upon the banks of the stream in the order mentioned, and that the plaintiffs, being owners of portions of Langverwacht, the lowest of the four farms, are entitled, as as riparian proprietors, to the use of the water of the stream for drinking and domestic purposes, and for watering cattle, ostriches, and stock, and are also entitled to have a reasonable share of the water for the purposes of irrigation. The plaintiffs complain that the defendants, called in the declaration the first-named defendants, who are owners of the three upper farms, have since 1880 interfered with the accustomed flow of the water, by taking an unreasonable share of it, and by diverting all of it from its natural channel during the dry and summer seasons of the year, that they have deprived the plaintiffs of water for domestic purposes and for their stock, and of a reasonable share for the purposes of irrigation. It is also alleged that the defendants have polluted the water in th stream, by conducting it through enclosures where stock and ostriches are kept, and over land impregnated with saline matter, so as to render such portion of it as occasionally reaches the plaintiffs' farms unfit for use. The plaintiffs estimate the damage suffered by them through the wrongful acts of the defendants at £2, 00. They claim to recover damages in the sum of £2,000, and pray for a declaration that they are entitled to have flow down to them in the said river sufficient water for domestic purposes and for stock, and that they are entitled to a reasonable share of the water for irrigation; and they also ask for an interdict restraining the defendants from taking more than a reasonable share of the water, and from polluting the water. The defendants who appear to defend this action are arranged in three groups, represented by different counsel, irrespective as it seems to me of the identity of their interests and without regard to any conflict of their rights, an arrangement which is certainly an awkward one, and which was obviously not without some embarrassment to counsel in their argument. However, in the view I take of the case, this will in the end not be of much consequence. Three sets of pleas have been filed by the defendants, which are not admitted by their counsel to be in all respects identical, and as to the legal effect of that portion of the pleas which seems to set up on behalf of the defendants certain special rights required by prescription, the views advanced by counsel differed in some respects. On the whole, however, I do not think there is any material difference in the defence set up by the defendants upon their pleadings. All the pleas agree in the following particulars. It is admitted that the Buffels River is a public and perennial stream, but it is denied that it has a continuous flow throughout the year. The plaintiffs are admitted to be riparian owners, entitled to water out of the stream for domestic use and for stock, and to a reasonable share for irrigation, subject, however, to what is thereinafter set forth in the plea. The limitation here mentioned to the admitted right of the plaintiffs is set forth in the 6th and 7th paragraphs of the plea of the defendants represented by Mr. Searle, where it is stated that for a period longer than the period of prescription certain dams have been in existence in the channel of the stream upon the farms Buffelskloof and Rietfontein, the property of the said defendants, and by means of these dams there has been collected during the dry seasons of the year all the water flowing above ground in the said channel. A certain quantity of the said water so collected has been used for the purposes of irrigation and otherwise by the defendants and their predecessors in title, and they have allowed the "afloop" and surplus water thereof to run back into the channel of the said stream on to the lower riparian farms, the remainder of the water so collected has flowed down for the use of the lower riparian farms That the water which flowed back into the channel and down to the plaintiffs' farm, together with the water which at all times flows in the channel on their farm is a reasonable quantity of the said stream, and has always been freely used by them. This portion of the plea has reference to what is called the dry season of the year. It would therefore seem from the plea that even during the dry seasons during the last thirty years the plaintiffs got a reasonable share of the water of the stream. Consequently the alleged user during the period of prescription was not such as to deprive the plaintiffs of their reasonable share of the water during any part of the year, and would therefore not be such an adverse user as interfered with the riparian rights of the plaintiffs, or such as to create any larger rights in the defendants than those ordinarily belonging to riparian owners. So long as the defendants after diverting and using the water for irrigation on their farms allowed a reasonable quantity of the water in its natural quality to flow back into the channel of the stream before it reached the plaintiffs' boundary they would merely be exercising their rights as riparian owners, and no servitude would be created by user. If the plea means no more than this it may be said the claim of the plaintiffs to a reasonable share of the water is undisputed. But when we come to consider the evidence of the defendants who were called as witnesses and the arguments of counsel, it would seem that the plea was intended to convey something more than appears on the face of it. The allegation in the ninth section of the plea that in time of scarcity there is not sufficient water for use of the defendants for domestic purposes, for watering their cattle and stock, and for purposes of irrigation, seems to be almost irrelevant. That such times may occur is perhaps not impossible, and at such times, when they do occur, the plaintiffs could not complain if no water reaches them. The complaint of the plaintiffs is not confined to any particular period of scarcity, but covers a large number of years. That the pleader did not intend to convey that every dry season of the year was a time of scarcity is clear from what is said in paragraph 6; but upon this point also it may appear that the defendants, in their evidence, go beyond the allegations in the plea. In the pleas of the other defendants the admitted rights of the plaintiffs to a reasonable share of the water is also subject to a limitation, but what that limitation is is not clearly stated. It would seem to be contained in the words of the 7th paragraph of their pleas, where it is said the user by the defendants of the water of the stream has been such as it has been for thirty years and upwards. This would seem to imply that if the defendants have used the water in such a manner and in such quantities as to interfere with the reasonable use thereof by the plaintiffs, they have only done what they have been doing for more than the period of prescription, and what they have acquired a right to do. In substance the pleas amount to this: the plaintiffs are entitled as riparian owners to a reasonable share of the water of the Buffels River, they have always enjoyed and still enjoy the use of such reasonable share, which the defendants have never interfered with, but the defendants have by prescription acquired certain rights by which the riparian rights of the plaintiffs are limited. Upon these pleadings, which are somewhat embarrassing and not free from inconsistency, it will be necessary to determine whether by prescription the defendants or any of them have acquired any rights of servitude affecting or varying in any way the ordinary riparian rights of both plaintiffs and defendants. If not, have the defendants in the exercise of their rights as riparian proprietors interfered with similar rights belonging to the plaintiffs? If they have, what damages have the plaintiffs suffered in consequence? The further question remains as to the pollution of the water and the damage resulting therefrom. It is alleged in the declaration that since 1880 the defendants have gradually increased their use of the water in the Buffels River for stock and irrigation, without regard to and in violation of the rights of the plaintiffs. It would be useful to inquire what it was that happened about that period, which might have influenced the defendants in their views and actions with reference to the use of the water, and whether it did so influence them. In that year an action was brought by the then owners of Langverwacht against the owners of Buffelskloof and Rietfontein, in which the former claimed the right to the use of the water of the stream in question for four days out of every twelve days in succession with the owners of Buffelskloof and Rietfontein, under and by virtue of the terms of the grants of these two farms, which provided that "the grantee of each farm shall have only four days at a time during the dry season the use of the water in succession with his neighbours, who now and hereafter may be dependent on the stream for the use of their respective lands." The case was tried on circuit before the Chief Justice, who granted absolution from the instance, and upon appeal his decision was confirmed by the Court of Appeal. This decision proceeded on the ground that the owners of Langverwacht, which did not adjoin Buffelskloof or Rietfontein, were not neighbours in terms of the grants mentioned above, and that the grants did not operate in their favour so as to give them a turn of four days' water. But it was found as a fact by the Chief Justice that notwithstanding the use then made by the owners of the upper farms of the water of the stream, the owners of Langverwacht certainly got a reasonable share of the water, if they did not indeed get more water than the upper proprietors. That being so, the plaintiffs in that case had nothing to complain of. This decision throws a great deal of light upon the mode of using the water then practised by the respective owners. It would appear that the owners of Buffelskloof and Rietfontein used water from the stream, as between themselves, in turns of four days out of every eight for each farm. The grants could not and did not give them the right to all the water in the stream as against other proprietors on the bank of the stream, whose grants were of even date, or earlier date. As a matter of fact, they did not use all the water of the stream, and also as a matter of fact, found by the Court in the above case, the owners of Langverwacht at that time enjoyed the use of a reasonable share of the water. In the face of circumstances existing in the year 1880, it would be difficult for the defendants to prove that they have for a period of thirty years made such use of the water as would operate as a restriction or limitation of the riparian rights of the plaintiffs. I am of opinion that although there may be some evidence there is no proof that either on the one hand the plaintiffs ever enjoyed a four days' turn of the water with the upper proprietors, or on the other hand, that the defendants, owners of Buffelskloof and Rietfontein, whose use of the water between themselves as riparian owners was regulated by their grants, at that time claimed the right to restrict, or did restrict the riparian rights of the owners of Langverwacht. The Court having decided in 188[illegible] that the owners of Langverwacht were not entitled to participate in the benefits of the other grants, it is not difficult to conceive how the upper proprietors misunderstood the legal effect of the decision, and overlooked the fact that the ordinary riparian rights of the lower owners were left untouched, if indeed they were not actually recognised by the judgment. I gather from the evidence, which is somewhat conflicting, that in about 1880 the farms Buffelskloof and Rietfontein used the water of the stream each in turn, but that from various causes enough water then passed down to the lower farms to allow them the reasonable share they were entitled to. In my opinion, formed upon the evidence, which I shall not analyse in detail, this was brought about in two ways. The dams placed in the river at that time were not so numerous or so securely constructed, but that they allowed water to escape through the chinks or through the sand underneath, which formed as it oozed up out of the sand lower down a considerable stream of what is called "opslag" water. And then also the water which was diverted for irrigation was not so fully and effectually used as to prevent a portion of it from finding its way back into the channel as "afloop" water. This "afloop" and "opslag" water together constituted a reasonable share of the water for the use of the lower proprietors. This is now entirely changed. More care is taken with the dams and the furrows, the river is more effectually drained of its contents, the water is used with more care and better results on the lands in the upper farms of the defendants. The result is that both "afloop" and "opslag" have been materially diminished. It is interesting to see what attitude is taken up by some of the defendants in the case. Hermanus Potgieter, part owner of Buffelskloop, who claims to have a turn of eight days out of every sixteen, and cultivates fifty morgen of ground says: "If there is not enough water in the river I think I have a right to take all; that is the custom." That is to say he is entitled all the year round to take as much water as he requires during his turn for his fifty morgen of ground, however it may affect other riparian owners. When it is borne in mind that water turns are confined to Buffelskloof, Rietfontein, and Andrieskraal, to the exclusion of Langverwacht it can easily be imagined what the effect of this user of the water would be on Langverwacht. And this would not be confined to what are called the driest portions of the year, but to the greater part of the year, even when there is a considerable volume of water in the river. When there would beyond doubt be enough water in the river to allow each of the owners of its banks the enjoyment of a reasonable share of it, the defendants claim, if they require all for their own benefit, the right to take all. Jan. Hendrik Potgieter says: "During the last four or five years there has not been enough water to divide with Langverwacht." From his point of view, as to what is enough for his requirement, this may be quite correct, but it does not answer the question whether, if the water is fairly divided, there will be a reasonable and beneficial share for all. The general effect of the evidence is that during the winter rains when the volume of water is too great to be divided by the dams and furrows on the upper farms, it will flow down to Langverwacht. No sooner is the quantity reduced to within the capacity of the dams and furrows than all the water is diverted and used on the upper farms, and the rights of Langverwacht to a reasonable share are ignored. This was the position asserted and acted upon by the owners of Buffelskloof, Rietfontein, and Andrieskraal. This was a very different attitude to the more modest one now set up by the pleas, and it is in respect of this attitude that the plaintiffs come into court to have their rights declared. The law on the subject of riparian rights is laid down by the Chief Justice in the case of *Hough* v. *Van der Merwe* (Buchanan, 1874, page 153), as follows: "In considering the uses to which the water of a public stream may be applied, we must distinguish between the ordinary or primary use and the extraordinary or secondary use of the water. The ordinary use is that which is required for the support of animal life, and in the case of riparian proprietors for domestic purposes; the extraordinary use is that which is required for any other purposes than those just mentioned. If the ordinary use is common to all the riparian proprietors it would manifestly be unjust to allow the upper proprietor to divert water for the purpose of irrigation if he thereby prevents the lower proprietors from having the enjoyment of the water for domestic purposes and for watering cattle. But if the extraordinary use by the upper proprietor would not deprive the lower proprietors of the ordinary use, it remains to be considered to what extent such extraordinary use will be permitted. If the ordinary use is common to all the proprietors, it would seem that the extraordinary use must be equally so. The right to the ordinary use is derived from necessity, the right to the extraordinary use from convenience. If, therefore, the upper proprietor in the enjoyment of his ordinary use, deprives the lower proprietors of their ordinary use, he would not be liable to them in an action; but if the upper proprietor, in the enjoyment of his extraordinary use deprives the lower proprietors of their extraordinary use, he would, according to the weight of authority, be liable to them in an action." If it were not for the utter ignorance of these principles manifested by the defendants, it would have seemed unnecessary to re-state the law there so clearly laid down, and ever since acted upon by this Court. I am satisfied upon the evidence that the owners of Buffelskloof and Rietfontein have used the water of the Buffels River for irrigation, not only in such a way as to deprive the plaintiffs of a like use, but even to the extent of depriving them of the beneficial use for domestic purposes and for stock. There is clear proof by disinterested witnesses that on one occasion when there was not water on Langverwacht fit for domestic use, the owners of the upper farms were using water in several furrows for irrigation. The water would at that time, an unusually dry season, have been enough for all the riparian owners for domestic purposes. Upon this point I may say that I am not satisfied that the brackish character of the water on Langverwacht at that time was due to the fact that it was led through ostrich enclosures, but I do think it was owing to the fact that so little water was allowed to flow down, that it became impregnated with saline matter in a larger proportion than would have been the case if more of the fresh water from above had reached Langverwacht. The defendants, by using more water than they required for domestic purposes, rendered the water unfit for use for domestic purposes and stock by the plaintiffs. I do not think it has been proved by the evidence led in this case that the defendants actually caused the pollution of the water in the manner alleged by the plaintiffs. Now it may be doubted whether during the last few months, when a very severe drought prevailed in the district, there was enough water for beneficial irrigation for all the farms. But this case is not confined to what has taken place during the last few months. It is alleged and has been proved that for several years, when there has been amply sufficient water for the purposes of irrigation of all the riparian owners on the Buffels River, the owners of Buffelskloof and Rietfontein have used more than a reasonable share of the water, and deprived the plaintiffs of their reasonable share. While the crops and lucerne-fields on the upper farms were in a flourishing condition, Langverwacht, with the exception of a small portion irrigated by water from Andrieskraal, was practically barren. Langverwacht was a well-cultivated farm when it obtained its share of the water of the stream, but since the upper owners have diverted more than a reasonable share it has been reduced to a very poor condition. For a considerable time now the plaintiffs have been suffering loss in consequence of the wrongful acts of the defendants. The defendants have raised a further issue in this case. They contend that the diminution of the water is caused by the action of the owners of farms situated above theirs; that they themselves use no more than they have for a long time been in the habit of using, and that the plaintiffs' complaint should be directed against the owners of Welgevonden, Kruis River, and Limerick. I have already said that I think Buffelskloof and Rietfontein also use more water than formerly, but even if that were not so, I am of opinion that if from any cause the river reaches Buffelskloof and Rietfontein in reduced volume, but still in sufficient quantity to retain its character of a permanent stream, all the riparian owners must abate their use, and share the benefits of the water as before. If the upper farms have made an undue use of the water redress can be obtained against them also. The action of the upper proprietors would of course affect the question of damages if it is shown that the losses sustained by the plaintiffs are partly due to their wrongful acts.

My remarks have mainly been directed to the conduct of the owners of Buffelskloof and Rietfontein, because I do not think it has been proved that the owners of Andrieskraal have diverted water, which if allowed to flow, would have been of any material benefit to Langverwacht. Very little water was allowed to reach Andrieskraal, which admittedly has been a fellow-sufferer with Langverwacht. But as Andrieskraal has also set up greater rights than it is entitled to, the declaration of rights must necessarily be directed against the owners of Andrieskraal also. The defendants have also pleaded that Langverwacht has the benefit of the Oliphant's River: that may be material when it becomes necessary to decide what share of the Buffels River would be reasonable for Langverwacht, but it does not affect the questions raised in this case. As to damages, it would certainly appear that Langverwacht has lately been in a deplorable state, largely, but not wholly, due to the action of the defendants. It has suffered greatly also from the effects of an unusually severe or protracted drought. The damages awarded should be confined to a limited period, and not go back to a long series of years, when the plaintiffs failed or delayed to take action. The materials before the Court for assessing damages are rather meagre, and how much is directly due to the action of the defendants it is also difficult to decide. But it is beyond doubt that the plaintiffs have sustained substantial damages through the wrongful acts of the owners of Buffelskloof and Rietfontein. We have come to the conclusion that if we award the sum of £250 as damages, it would meet the justice of the case. Judgment will be for the plaintiffs as against the owners of Buffelskloof and Rietfontein for £250 as damages; a declaration of right as against the owners of Buffelskloof, Rietfontein, and Andrieskraal is made in terms of prayers (*b*) and (*c*) of the declaration; and in terms of prayer (*f*) the defendants called in the declaration the first-named defendants are ordered to pay the costs.

Solomon, J., said: In considering the question whether the plaintiffs are entitled as against the defendants to a declaration of their right to a reasonable share of the water in the river for the purposes of irrigation, we start with the admissions made in the pleadings, first that the Buffels River is a public and perennial stream, and secondly, that Langverwacht is a riparian farm upon the said river. As such riparian farm it is further admitted that by common law the owners of Langverwacht are entitled to have a fair and reasonable share of the water of the river flow down to them for purposes of irrigation. The pleas allege that the plaintiffs have always had the use of a reasonable share of the stream; but the evidence has wholly failed to prove this allegation. On the contrary it has been conclusively established, in my opinion, that for the last few years at any rate (and it is not necessary for the purposes of the case to go further back than that), the plaintiffs have not had by any means a fair share of the stream; and that during the year 1898 they have had practically no water available for purposes of irrigation. Moreover, I am satisfied that in these same years a stream of water, capable of being applied to the common use of all the riparian proprietors, has flowed into the upper farm Buffelskloof; but that the proprietors of Buffelskloof, Rietfontein, and Andrieskraal claim and exercise the right to use as much of the water of the stream as they require for their own purposes without regard to the wants of the lower farm Langverwacht. The consequence is that during the dry season of the year the defendants frequently appropriate the whole of the water of the stream for irrigating their lands, and claim that in so doing they are acting within their rights. Now, on the face of it, such a user of the water of a public stream by upper proprietors seems to be a clear infringement of the rights of the lower proprietor, and it lies upon the defendants to satisfy the Court that this is not so. In considering the position taken up by the defendants, I propose to deal not so much with the defence set up in their pleas, which has been so fully and clearly analysed by my brother Maasdorp, but rather with the case which was made on their behalf in the arguments of counsel, in which the whole question was very fully discussed. And as I understand it, the defendants first of all take up this position: They say that even assuming that they do deprive the plaintiffs of sufficient water for purposes of irrigation during the summer months, they themselves use only a reasonable quantity of water, which they are entitled to do; that they use no more now than they did in 1880, when it was decided in the Circuit Court that they did not make an unreasonable use of the water; and that in time of scarcity they themselves often have not sufficient water for the irrigation of their lands. Now as regards the quantity of water used by them, I entirely agree with the view taken by my brother Maasdorp on the facts, and I need not therefore take up time by restating what he has said. But even assuming that the facts are correctly stated above, I am of opinion that the position taken up by the defendants is an untenable one, and in dealing with the question, let me first discuss it without reference to the farm Kruis River, and test the case as if there were no riparian farm higher than Buffelskloof. In that case, it is clear, I think, that the defendants' contention could not be sustained, being based upon this entirely wrong principle, viz., that an upper riparian proprietor is entitled to take a certain quantity of water from a perennial stream without regard to the necessities of the lower proprietor. Now the true principle of law, as has been laid down in numerous cases, is that an upper riparian proprietor is entitled, not to a certain quantity of water, but to a reasonable share of the water of the stream; and further, that his rights are limited by a consideration of the rights of the lower proprietors to a similar use of the water. And it is almost unnecessary for me to point out how important and essential the difference is between these two propositions. The quantity of water which the upper proprietor is entitled to take will vary from time to time as the volume of the stream increases or decreases, and if there is abundant water for all the proprietors he may take as much as he requires, or practically an unlimited quantity: but in dry seasons when the stream runs low, though his share of the water remains the same, the actual quantity which he is entitled to take may be exceedingly small, and his user is limited by the important consideration that he does not thereby interfere with the similar rights of the lower proprietors. In no circumstance, therefore, is the upper proprietor of a public and perennial stream entitled to take all the water of the stream for purposes of irrigation; whereas if the principle, which appears to be contended for by the defendants, were the correct one, he might do so at the very time when the lower proprietor was most urgently in need of water. It would be waste of time for me to quote authorities in support of the doctrine which I have stated, though I might refer, amongst many, to the extract from the judgment in *Hough* v. *Van der Merwe*, which has been quoted by my brother Maasdorp. It is true that several witnesses in this case have deposed that it is the practice in the Oudtshoorn district for upper proprietors to take as much water as they require for their own use without regard to the wants of the lower proprietors; but it is almost unnecessary to say that such a user is an infringement of the legal rights of the lower proprietors, except in cases where a prescriptive right can be established. And it is only right to say that in their arguments defendants' counsel did not rely upon the alleged custom of the Oudtshoorn district in support of the position which they take up. Thus far I have eliminated the factor of Kruis River from my consideration; but the defendants rely strongly upon this argument, that it is not they but the owners of Kruis River who deprive the plaintiffs of a reasonable share of the stream. Now, it has been clearly established that since '880 the owners of Kruis River have largely increased the area of the lands irrigated by them. It is probably not going too far to say that the area has been nearly doubled, and that consequently they use a great deal more water now than they did in 1880. Whether this is an unreasonable user of the water by the owners of Kruis River is not so easy a question to determine, especially as they are not represented in this case. It must be borne in mind that Kruis River has six miles of river frontage, and cultivates about 420 morgen of land according to the evidence, which does not happen to be an excessive amount. Of course if Kruis River only uses its fair share of the water it is clear that the defendants cannot say that Kruis River is the guilty party. I am bound to say, however, that there is a good deal of evidence to show that Kruis River does use more than it is entitled to, though I think the defendants have greatly exaggerated the amount. But taking it as proved that they do use more than their fair share, I confess I cannot see on what ground it can be said that the extra water used by them is water which should have gone to Langverwacht, and not to Buffelskloof or Rietfontein. The whole of the water of a public stream is common to the riparian proprietors: any water taken out of Kruis River is taken from the common stock; and what remains and flows down to Buffelskloof still continues to form a public stream, provided that it flows in sufficient quantity to be capable of being applied to the common use of the other riparian proprietors, Now, on this latter point I have no doubt whatever. It seems to me that the evidence of Gavin and others establishes beyond doubt that even so late as October last, during a year of exceptional drought, there was sufficient water flowing on Buffelskloof to be applied to the common use of the lower farms. I do not say that in bad seasons there is enough to supply all the wants of all the farms. In fact, it is quite possible that in very bad seasons the stream might not be sufficiently strong to reach Langverwacht, even if the whole of it was allowed to run down. But the stream does not on that account forfeit its character of a public and perennial stream. And being a public stream, it follows that as the water decreases in volume, each riparian proprietor must abate in the quantity of water which he uses. If the owners of Kruis River use more water than they are entitled to, the defendants have a right to proceed against them; but they cannot, in my opinion, take up the position that they are still entitled, notwithstanding the diminished flow, to take the usual quantity of water, and that if Langverwacht falls short, its remedy is against Kruis River alone. Upon this point, as well as upon all the points raised in this action, the case of *Van Schalkwyk* v. *Hauman* (7 Sheil, 195) is a clear authority. In fact, that case and the present are almost entirely on all fours, and it would perhaps have been sufficient in giving judgment in this case merely to have referred to the case as having disposed of the questions raised in this action. Having now dealt with the main contentions raised on behalf of the defendants. I proceed to consider shortly the defence raised by some of them that they are entitled by prescription to use the water as they are now doing. I must confess that I share my brother Maasdorp's difficulties in understanding the plea of prescription that has been filed in this case. But passing that by, I fail to see how it is possible on the facts for the defendants to establish that they have acquired by prescription a right to use the water in such a way as to deprive the plaintiffs at certain seasons of the right to their fair share of the water. It is common cause that in 1880 the plaintiffs did have a fair share of the stream, and that it was so found in the Circuit Court at Oudtshoorn. As long as the plaintiffs had their fair share, whether it came to them as "afloop" or as "opslag" water, they had no right to interfere with the defendants' use of the water; and having no right to interfere, how could any particular user by the defendants be taken after a lapse of thirty years to have conferred upon them any right in addition to their common law right, or to have deprived the plaintiffs of their common law right. Before the plaintiffs could be deprived of their riparian rights it would be necessary to prove that there had been adverse user as against them for a period of over thirty years, and there is certainly no such evidence in the present case. Consequently the plea of prescription entirely falls away. In my opinion, then, the plaintiffs have established their right to a declaration against the defendants that they are entitled to a fair and reasonable share of the water in the Buffels River for purposes of irrigation. It has been strongly contended that the declaration should not be made against Andrieskraal, as they themselves have also suffered much from want of water through the action of the upper proprietors. The owners of Andrieskraal, however, have made common cause with Buffelskloof and Rietfontein, and they claim the same right as these farms do to deprive Langverwacht of the whole of their water whenever they require it for their own purposes. Having set up this claim, which, in my opinion, is wholly untenable, it is necessary that a declaration of rights should be made against Andrieskraal, as well as against Buffelskloof and Rietfontein. As regards damages, however, I agree that, inasmuch as it has not been proved that the plaintiffs have sustained any actual damage by the action of the owners of Andrieskraal, no damages should be given against them. Another point which was urged upon us was that only those proprietors who have been proved by direct evidence to have made an unreasonable user of the water should be mulcted in damages, and that judgment ought not to be given against the owners of the farms generally. The evidence, however, shows clearly that each of the farms has common furrows, in which the water flows during the turn of that farm, and that it is subdivided amongst the different proprietors. All the proprietors accordingly are joint tort-feasors, and judgment must be given against them all. Finally, as regards the amount of damage sustained, I am satisfied that £250 is by no means an unreasonable amount to award, and that judgment should be entered for that sum against those owners of Buffelskloof and Rietfontein.

[Plaintiffs' Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendants' Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

SUPREME COURT

[Before the Hon. Mr. Justice **MAASDORP** and Hon. Mr. Justice **SOLOMON**.]

ADMISSIONS. { 1898. Nov. 30th.

Mr. Benjamin moved for the admission of Johannes Gerhardus Pieter van der Horst as an attorney and notary of the Supreme Court.

The order was granted, and leave given to take the oaths before the Resident Magistrate of Port Elizabeth.

Mr. Buchanan moved for the admission of Louis Flavien Lezard as an attorney and notary of the Supreme Court.

The order was granted, and leave given to take the oaths before the Resident Magistrate of Kimberley.

PROVISIONAL ROLL.

MARAIS V. J. F. BAARTMAN, JUN.

Mr. Buchanan applied for an order for the final adjudication of the defendant's estate.

The Court granted an order as prayed.

SMITH AND CO. V. SMAL.

Mr. Maskew applied for provisional sentence on a promissory note for £18 13s.

Granted.

BULLENTRAUSE AND BROTHERS V. VISAGIE.

Mr. Maskew applied for provisional sentence on a mortgage bond for £675, with interest at the rate of 6 per cent. from October 1, 1897, less £8 paid on account, and also on a mortgage bond for £108, with interest from the same date.

Granted, the properties hypothecated being declared executable.

THE MASTER V. F. H. B. MOORE.

Mr. Sheil, Q.C., moved for the usual order calling upon defendant to file an account in the estate of which he was the executor.

Granted.

PHILIP BROTHERS V. THE CAPE COLLIERIES, LIMITED.

Mr. Molteno applied for provisional sentence on a promissory note for £375 1s. 8d.

Granted.

DEWITT V. MARY FALCONER.

Mr. Gardiner applied for provisional sentenceon a mortgage bond for £400, with interest at the rate of 8 per cent. from June 15, 1897, and that the property specially hypothecated be declared executable. The amount had become due by reason of the non-payment of the interest.

Granted.

DE HEATON V. C. W. LEE.

Mr. Molteno applied for provisional sentence on a promissory note for £80, with interest from September 1, 1897.

Granted.

ILLIQUID ROLL.

COLONIAL GOVERNMENT V. E. MANUEL.

Mr. Sheil applied under Rule 329D for judgment for £4 10s., quitrent due, or failing payment within three months, cancellation of the defendant's title deeds.

The order was granted.

REHABILITATIONS.

Mr. Joubert moved for the rehabilitation of the estate of Jacobus Meyburgh. The estate was surrendered on June 19, 1894. There was no distribution at all, the assets only realising about £9, while the costs of liquidation were over £14.

The order was granted.

Mr. Buchanan moved for the rehabilitation of the estate of Hendrik van der Merwe Steynberg. The estate was surrendered on September 30, 1882.

The order was granted.

Mr. Benjamin moved for the rehabilitation of the estate of Charles Frederick Austin. The estate was sequestrated on April 2, 1886.

The order was granted.

GENERAL MOTIONS.

IN THE MATTER OF THE PETITION AT THE DUTCH REFORMED CHURCH OF PETRUSVILLE.

Mr. Buchanan moved that the rule *nisi*, granted under the Derelict Lands Act, be made absolute.

The rule *nisi* was made absolute.

LOUW V. LOUW.

This was an application for a decree of divorce on the ground that the defendant had failed to comply with an order made by the Circuit Court at Victoria West on September 29 for restitution of conjugal rights, failing which to show cause by November 17 why a decree of divorce should not be granted. The matter had been before the Court on the 17th November, and ordered to stand over until the present date.

Mr. Gardiner appeared for the petitioner.

The Court granted a decree of divorce as prayed with costs against the defendant, the petitioner to have the custody of the minor child of the marriage.

IN THE ESTATE OF THE LATE DALINGOZI.

Mr. Close moved that the rule *nisi* for transfer of certain land be made absolute.

The rule *nisi* was made absolute.

IN THE ESTATE OF THE LATE FILL BING.

Mr. Gardiner moved for leave to raise a certain sum of money on mortgage of property in the estate of the late George Fill Bing. The petitioner, who was the widow of the deceased, had since her husband's death supported herself and the minor children by keeping a boarding-house at Port Alfred, but owing to business being bad she had removed to Port Elizabeth and let the house at a good rental. She therefore prayed for leave to raise a sum of £50 upon the property, to pay off a sum of £20 incurred in repairing the house before it could be let, and also to pay the school fees of the children and the expenses of removal to Port Elizabeth.

Maasdorp, J., said that it appeared that in this case the mother had been struggling for some time to support the minor children, but was now in some stress and required money. The only way of raising that money was by mortgage upon the property in the estate as suggested in the petition. The Master had very considerable objection to that, because he considered that the expenses of raising a mortgage of £50 would be too great, but as it appeared that the mother and the major children were consenting parties, and were all acting for the benefit of the minor children in the estate the order asked for would be granted.

BIRD V. BIRD.

This was an application for a decree of divorce, the defendant, George Stephen Bird, having failed to comply with an order of the Supreme Court granted on September 27 last, calling upon him to restore to plaintiff her conjugal rights, failing which to show cause why a decree of divorce should not be granted.

Mr. Close appeared for the petitioner.

The Court granted a decree of divorce as prayed with costs, petitioner to have the custody of the minor child of the marriage.

GROVE AND ANOTHER V. THE SOUTH AFRICAN SALTPETRE-FIELD.

Sir Henry Juta, Q.C., moved that the rule *nisi* granted on October 12, for the cancellation of a certain notarial agreement, be made absolute.

The rule *nisi* was made absolute.

HOCHSCHILD V. HANNUM.

Mr. Jones moved that the rule *nisi* calling on the respondent to show cause why certain moneys allowed to him as compensation for cattle destroyed under the rinderpest regulations, and now in the hands of the Government, should not be attached.

The rule *nisi* was made absolute.

KLEYN V. BEYERS AND DEMPERS.

This was a motion for leave to add certain further particulars to Schedules A and B annexed to the Caledon election petition.

Mr. Innes, Q.C. (with whom was Sir Henry Juta, Q.C.), appeared for the petitioner, and said that the application was to add one name to the bribery schedule, and six to the treating schedule. There was no appearance on behalf of the respondents, but a consent paper had been filed.

An order was given in terms of the consent paper.

MARNEWICK V. SAPIERO.

1898.
Nov. 30th.
1899.
Jan. 12th.

Reopening case—Absence of defendant—Magistrate's Court.

Where a summons was properly served at the defendant's residence during his absence from home and judgment was given against him *in the Magistrate's Court by default of appearance, and he had no knowledge of the summons or of the proceedings until after a month had elapsed.*

The Court refused *to order the proceedings to be reopened.*

This was an application for an order for the reopening of a case adjudicated upon by the Resident Magistrate of Oudtshoorn or for permission to bring the judgment under review.

The applicant had left his home at Oudtshoorn in June, 1898, in search of work, his destination being unknown to his wife and family, he obtained employment in the district of Willowmore and remained there until the 26th October. The respondent in the meantime instituted an action against him for the recovery of £8 due upon the sale of certain water-rights, summons was issued and served, in the applicant's absence, upon his daughter at his residence. On the 4th July, the applicant being in default, the Magistrate gave judgment against him. On the 2nd September a warrant of execution was issued and a return of *nulla bona* was made. The applicant knew nothing of any of these proceedings until his return home in October, but did not take steps at once to have them set aside as he was advised that proceedings taken by the respondent against other defendants under similar circumstances had been abandoned. A summons for a decree of civil imprisonment was subsequently served upon him, he now alleged that he was advised that he had a good defence to the action.

Mr. Searle, Q.C., for the applicant: The matter cannot be reopened as a month has elapsed since judgment, the judgment has therefore become final. I can find no authority for the re-opening of a case where judgment has become final. Act 20 of 1856, Schedule B, Rules 28, 29, 30. But the proceedings can be reviewed on the ground of excess of jurisdiction, future rights are involved, the gist of the action was the delivery of certain hours of water-leading, although judgment was given merely for the value of the water, future rights had to be adjudicated upon.

De Villiers, C.J.: The applicant really has himself to blame for what has occurred. He left his home without telling anyone where he was going. A month after his return and after the time for doing so has expired, he wants to reopen the case. He is not quite sure even if the case was reopened that he would succeed. The application will be refused.

Maasdorp, J., and Solomon, J., concurred.

[Applicant's Attorneys, Messrs. Tredgold, McIntyre and Bisset.]

IN THE MATTER OF THE PETITION OF STEPHEN BAX.

Mr. Close moved that the rule *nisi* granted under the Derelict Lands Act, 1881, be made absolute.

The rule *nisi* was made absolute.

IN THE ESTATES OF THE LATE ZACHARIAS ENSLIN AND JACOBA JACOMINA ENSLIN.

Mr. Upington moved for leave to the executors in the above joint estate to transfer certain property which had been sold.

The Court granted an order confirming the sale, subject to the payment of £2,200 to the executors by F. C Altringer, and subject to the production of the written consent of Peter Nel, one of the heirs in the estate, who had given a verbal consent.

IN THE MATTER OF PETITION OF ALFRED AND ELIZA OATES.

1898
Nov. 30th.

Mr. Molteno moved for leave to raise a sum of money on a life policy. The petitioners were married without community of property, and under an ante-nuptial contract the said Alfred Oates settled a life policy in the Mutual Society in trust for his wife. The said Alfred Oates continued to pay the premiums regularly until recently, when he had unfortunately to surrender his estate, and was not at present in a position to pay the premiums or to maintain his family. He therefore proposed to raise a loan of £232 6s. 3d. upon that policy, that being its full surrender value. The society was willing to advance that amount upon the policy being pledged to them. Petitioner's wife had agreed to that course. The trustee under the ante-nuptial contract was dead, and there was no one but the wife interested.

Maasdorp, J., said that as it appeared from the ante-nuptial contract that the only parties really interested were the husband and wife, and the latter had consented to the course proposed, and as it also appeared that the money was actually necessary for the support of the wife and family, an order would be granted giving leave to the petitioner to obtain a loan of an amount to the extent of the surrender value of the policy, the policy to be pledged with the South African Mutual Society as security for the loan.

IN THE MATTER OF THE PETITION OF DANIEL JACOBUS BLOM.

Mr. Benjamin moved that the rule *nisi* for cancellation of a certain bond be made absolute.

The order was granted.

IN THE ESTATE OF THE LUNATIC CHARLES JOHN GRIFFITH WATSON.

Mr. P. Jones moved that the curators of the above estate be granted leave to sell certain property in the estate.

The Master's report was favourable, and the Court granted an order in terms of that report.

MEIER V. MARKS.

Mr. Molteno moved that the rule *nisi* attaching certain property be made absolute.

The order was granted.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice SOLOMON.]

MINNAAR V. MINNAAR AND MINNAAR.

1898.
Dec. 2nd.
„ 3rd.

This was an action for divorce brought by the plaintiff, Pieter Albertus Minnaar, against his wife, on the ground of her adultery with one Japie Minnaar. The declaration set forth that the parties were married at the Paarl on September 3, 1883. That marriage still subsisted, and there were three children of it. The adultery was alleged to have been committed on divers occasions in August and September of this year. The prayer of the plaintiff was for a decree of divorce against the first-named defendant, that he should have the custody of the minor children of the marriage, that the first-named defendant be declared to have forfeited all the benefits of such marriage, and ordered to pay a certain sum for the maintenance and education of the said minor children, and that the second-named defendant be adjudged to pay the sum of £1,000 as damages.

Mr. Benjamin (with whom was Mr. Buchanan) appeared for the plaintiff.

Mr. Searle, Q.C. (with whom was Mr. Currey), appeared for the first-named defendant (Mrs, Minnaar).

Sir Henry Juta, Q.C. (with whom was Mr. Close), appeared for the second-named defendant (Mr. J. Minnaar).

The first witness called for the plaintiff was

David Heyns, a coloured lad thirteen years of age, deposed that on September 28 last he went to the reservoir at the Paarl to cut a twig to make a catapult. While he was on the top of a rock there he saw Mrs. Minnaar come towards the place where he was, Mr. Japie Minnaar following shortly afterwards. The two then went into the bush, and witness saw Mr. Japie Minnaar kiss Mrs. Minnaar. Afterwards he saw them commit adultery. Mr. P. Minnaar (the plaintiff) and Mr. De Villiers then approached. and Mr. Japie Minnaar ran away. A boy named Johannes was with witness at the time and another boy, Pieter Avontuur, came up and saw Mr. Japie Minnaar run away. Afterwards witness and the other boys gave Mr. Pieter Minnaar their names. Mrs. Minnaar had crawled away, but the plaintiff followed her up, and witness saw him beating her.

Cross-examined: Witness and Johannes were about ten feet higher up than Mrs. Minnaar and Mr. Japie Minnaar. At that time it was about half-past one. Witness and the other boy were sitting on the rock, but did not have their feet hanging down the face of it. Mrs. Minnaar came from the corner of Berg-street. The other two boys were higher up than witness and Johannes.

Johannes Bruintjes, another coloured lad, corroborated the evidence of the previous witness.

Arend Cupido, a coloured boy, gave evidence as to his having seen Mrs. Minnaar and Mr. Japie Minnaar together under suspicious circumstances on August 28.

Piet James, also coloured, corroborated the evidence of the last witness.

Jacob de Villiers, a farmer, residing near the reservoir at the Paarl, stated that that was not a frequented spot. On the afternoon of September 28 last the plaintiff came to him, and asked him to go with him as a witness. Witness thought he meant to go after thieves. He accompanied plaintiff, and afterwards they came up with Mrs. Minnaar. Plaintiff gave Mrs. Minnaar a blow with a stick.

Pieter Albertus Minnaar, the plaintiff, deposed that he married the defendant on September 3, 1883. Witness continued to live with his wife for some time except when he made occasional trips to the Transvaal, where he had business. The last occasion he was in the Transvaal was in 1895. When he came back in that year he had been away three years and three months. He then resumed living with her as usual on good terms. After witness returned his wife purchased a millinery business from Japie Minnaar. It was in the front of a double-storied building, and in the back there was a room which his wife at first used as a dressmaking-room, and afterwards as a sort of provision-room. Japie Minnaar had a room at the back of the building. Witness had then no suspicion of anything wrong between his wife and Japie Minnaar, but from certain things which afterwards happened he began to entertain suspicions about them. On September 28 last, in consequence of an anonymous letter he received he went to the water-house at the reservoir. That was about 11.30, and about 1.40 his wife came up Berg-street, while Japie Minnaar came from another direction and joined her. Witness was behind a tree, and they passed him without seeing him. Witness then went and brought Mr. De Villiers, and they followed up the footmarks of his wife and the co-respondent, and when they came to the rock he saw Japie Minnaar run away. He afterwards saw the three boys, and took their names. The two eldest children of the marriage were girls, fourteen years and twelve years old respectively. The youngest was a boy nine years of age. Witness's wife had got property in her own name worth £2,000, but witness had been the architect of the property and had helped to complete it. There was also a large piece of land attached to it, with 6,000 American vines, and plaintiff had worked in that vineyard. Witness's wife had paid the co-respondent £230 for the millinery business. Witness knew from his own knowledge that the second-named defendant had a life policy on a man forty years of age, and also that he had money in the bank.

Cross-examined by Mr. Searle: When witness married defendant she had received £800 from her father's estate. Witness could not say how much she received from her mother's estate as she had never shown him the will. After they married they lived with defendant's mother for some years. Between 1887 and 1895 he was several times in the Transvaal. He had done everything for his wife that a man could. When in the Transvaal witness's firm had become insolvent. He denied that when he returned in 1895 his wife took over the business in order to support him and the family. She had only paid the children's school fees. He had given her money from time to time. Her mother died shortly before defendant took over that business. She never told him the terms on which she took over the business. Eighteen months ago he had forbidden Japie Minnaar his house, as he had his suspicions. Afterwards witness wanted his wife to give up the business, as Japie Minnaar was too close to her. On September 28, between the time of his seeing his wife with the co-defendant at the reservoir and his return with Mr. De Villiers, witness was away ten or twelve minutes. When he came up with his wife he upbraided her, and she replied "Have you caught him?" He said he did not need to catch him as he had caught her. Witness had known Japie Minnaar for a long time. Witness positively denied that he had given a coat and a pair of boots either to one of the boys who were there or to the father of one of the boys.

By Sir Henry Juta: Witness's wife had given him about £800. She never sent him £25 to bring him back from the Transvaal. Witness never demanded the interest on the £1,000 his children received from the estate of defendant's mother. He had been suspicious of defendant since 1895, and had watched her since then, but had never employed any other person to do so. He was not naturally a jealous man, or he would not have gone away from her for three years and three months. Witness never gave the boy Avontuur or his father anything or offered them anything.

This closed the case for the plaintiff.

For the defence,

Anna Aletta Cornelia Minnaar, the defendant, deposed that after her marriage to plaintiff they lived with her mother, and in 1897 plaintiff went to the Transvaal. Since then he had never supported her. She had just lived with her mother. The terms on which she and Miss Anna de Villiers took the business over from Mr. Japie Minnaar was that they were to pay him the £230 after three years, and in the meantime they were to pay the interest on that sum. She had never told her husband about the terms on which she took over the business. This year she and Miss De Villiers resolved to give up the partnership. Since her mother died witness had always had trouble with her husband about money. He wanted the interest on the children's £1,000. In consequence of advice she got in a letter from her brother in Caledon, she made an appointment with Mr. Japie Minnaar. It was to make arrangements about giving up the business. She went to the reservoir to meet him because she did not wish to be seen. It was in an open place they met, and she was not with him more than five minutes. She did not talk over the business in the shop, because she did not wish Miss De Villiers to hear the arrangements with regard to it. Nothing improper took place between witness and the co-defendant either at the reservoir or any other time. When she saw her husband coming she told Japie Minnaar to run away. Her husband afterwards struck her about twelve or fourteen blows. Witness never saw the boys there. The place was about ten minues' walk from her shop.

Cross-examined: She did not settle the business then, and it was not yet settled. Towards the end of August she had met Mr. Japie Minnaar near the reservoir. That was also in connection with the business. She never ran away then. She did not then see the two little boys there. They might have seen her, but she did not see them. When her husband had spoken to her before she had said, "All your efforts will be in vain; you can watch as you like." Witness knew he was suspicious of her. When at the end of August she met the co-respondent, a servant girl named Rachael Adams was not far away the whole time.

Rachael Adams, a servant girl at the Paarl, deposed that she knew Mrs. Minnaar. On a Monday towards the end of August last, witness met her in Berg-street. Witness had a conversation with her. Witness did not see where she went to, but afterwards she heard voices, and turning round saw defendant and co-respondent talking together. They were together about three minutes, and then defendant passed witness by herself and went down Berg-street. Defendant and co-defendant were in witness's sight all the time. It was about two o'clock in the afternoon.

Cross-examined: Witness did not know the date, but she was certain it was in the month of August.

The following evidence was led on behalf of the co-defendant:

Antony Aaronson, a coloured boy, residing at Paarl, deposed that in September last he went with Heyns, Bruintjes, and Avontuur to the reservoir. It was after twelve o'clock. Witness and the other boys were on a rock when he saw Mrs. Minnaar coming up Berg-street. Mr. Japie Minnaar came up and met her, and they stood talking together. Then Mr. Japie Minnaar went away, and Mr. Pieter Minnaar came up and struck his wife. Witness could not see well from the rock, but he could see as well as Bruintjes and Heyns. Witness saw nothing improper take place between Mr. Japie Minnaar and Mrs. Minnaar.

Cross-examined: Witness was a little higher up on the rock than the other two boys.

Pieter Avontuur, a coloured youth, deposed that last September he and the last witness, along with Heyns and Bruintjes, went to the reservoir at the Paarl. He corroborated the evidence of the last witness as to the meeting between Mr. Japie Minnaar and Mrs. Minnaar. Nothing improper took place.

Cross-examined: The statement put in witness had signed, but it had not been read over to him. (This statement was to the effect that witness from his position on the rock could see what Mr. J. Minnaar and Mrs. Minnaar were doing.)

Jacob E. Minnaar, the co-defendant, said that he and Mrs. Minnaar had grown up together from childhood. Witness had sold the business to her. He had a room in the same place. Witness and plaintiff, who came back from the Transvaal in 1895, had been good friends until about twenty-one months ago, at which time they had a row, plaintiff having found witness standing in the shop, after which they never spoke to each other. During the time the business had been carried on there had never been any improper relations between witness and the defendant. When he met Mrs. Minnaar about the end of August it was in connection with the business. At the time he saw a coloured woman about twenty yards away. That was the only meeting they had in August last, and nothing improper took place. With regard to the meeting in September, that had been in connection with the proposed dissolution of the partnership between defendant and Miss De Villiers. Witness met defendant near the reservoir in place of the shop, because she said she had received a letter from her brother, and she wanted a long talk with witness over it. He believed she did not wish to discuss it before Miss De Villiers. Witness had told his friend, Mr. Johann de Villiers, that he was going to meet the defendant at the reservoir. Nothing improper took place between witness and defendant at the meeting. While they were talking they heard footsteps. Mrs. Minnaar said it might be her husband, and urged him to leave, which he did. Witness saw the boys on the rock when he went there. Witness was a carpenter, and had no property or shares. He had a little money, about £90. He had received the £230 for the business, but it was all gone in paying his debts.

Cross-examined: Witness had some furniture; he would be willihg to pledge that for £90. He had removed the furniture from the place where it was since this case commenced. The life policy he held on the life of Mr. De Klerck he had sold in April last for £200. He had spent the money in claims at Hope Town. Witness used to have money in the Corporation Bank at the Paarl, but he did not have any there now, having withdrawn it. He took it out when he went to Johannesburg in May last.

Johann de Villiers, manager of Retief's wagon works at the Paarl, said that the co-defendant used to consult him about all his responsible business, and in September last came to consult him about the business carried on by Mrs. Minnaar and Miss De Villiers. Witness was aware there was to be a meeting between co-defendant and Mrs. Minnaar the following day. The co-defendant consulted witness about it so that it was not in any way a secret meeting.

After argument,

De Villiers, C.J., said: I quite agree with both counsel for the defence that the burden of proof of adultery lies upon the plaintiff, but the Court has never gone so far as to hold that there must be eye-witnesses of the offence, for if that amount of proof were required adultery would seldom be proved. It is generally only by means of circumstantial evidence that adultery can be proved, for although there may have been exceptional cases in which there have been eye-witnesses, I myself can remember very few of that kind in this country. In the present case the day on which the adultery is alleged to have been committed, and on which most reliance is placed by the plaintiff is September 28 last. I may say at once that if what took place on that day stood by itself I should still be inclined to give the defendants the benefit of the doubt, but we must consider the previous relations between the two defendants, the manner in which the business was sold by the first defendant, and the degree of intimacy which arose between them when they were living closely together, when the second defendant occupied a room in the immedite proximity of the place in which the first defendant carried on business. The plaintiff has sworn as to the intimacy which existed between them at that time, an intimacy which appears to have been sufficient to engender suspicion in the mind of the plaintiff, altnough not sufficient to prove the actual guilt of the wife. Subsequently about August these people were seen under circumstances of extreme suspicion. The manner in which these two boys gave their evidence as to what took place in August satisfies me that they at all events tried to speak the truth. Then I am not satisfied that that was the same day as that spoken of by the witness Rachael, for it is quite possible that the defendants may have been there on other days. The two boys were clear that it was the day on which the bazaar was held at the Paarl, while the witness Rachael said nothing about the bazaar, nor was she asked any questions on that point. Therefore her evidence only contradicted that of the boys so far as to say that it could not have been on the day when she saw the two defendants. Now we come to September. It appears that in consequence of an anonymous letter received by the plaintiff, on the same day he watched his wife going up the hillside, and shortly afterwards saw the second defendant following her. His suspicions were confirmed, and he at once went to Mr. Jacob de Villiers and asked him to accompany him as a witness. Sir Henry Juta has said that a man who could do that might be guilty of anything, but I must confess I do not see anything very wrong in his doing it. He wanted some witness, not to see the actual adultery, but to see the suspicious circumstances which would justify him in believing that adultery would be or had been committed. Well, plaintiff and Mr. De Villiers went together, and they found these two persons under circumstances of extreme suspicion, to say the least of it. The whole conduct of the two defendants was that of guilty persons, for if there were no guilt, clearly the co-defendant would have at once come forward and given an explanation. He could have said. "Here is a letter which your wife has just given me and which she received from her brother." Instead of that he ran off, and it being seen that his conduct required an explanation a revolver is then spoken about, and it is said that he ran away because it was known that the plaintiff carried a revolver, and that the defendant was afraid that her husband might shoot the co-defendant. I am afraid that is a lame explanation of the conduct of the defendants. Then the explanation as to their meeting there at all seems to me still more lame. They said that they wished to talk about some business matter, but that they did not wish to do so in the shop in the presence of Miss De Villiers. But surely if the husband had been told about the letter which had been received from the wife's brother, and that it was important that she should see the man with whom she was doing business in view of the dissolution of partnership between her and Miss De Villiers, he would have consented to a meeting between them taking place. There is nothing in the conduct of the plaintiff to show that he would not. The explanation that she had to go for a ten minutes' walk up the mountain-side and into the bush for the purpose of transacting formal business which could have been done on the stoep or in the shop itself if Miss De Villiers had been asked to leave for a time, or which could have been done in the presence of the plaintiff himself, was altogether lame. Therefore, taking all the circumstances into consideration, I do not think that the evidence of the coloured boys is to be altogether cast aside. There were some discrepancies no doubt, but they will always occur in cases where small boys give evidence. The evidence of the coloured boy called for the defence can not be trusted, as he contradicted in court the statement he had previously signed, although it was evident he could read. Under all the circumstances I am of opinion that the plaintiff has proved the adultery between his wife and the co-defendant. The next question is the custody of the children, and the rule has always been that the innocent party should have the custody of the children, but of course the defendant will have access to her children at all reasonable times and places. There is also the claim that she should bear her share in the maintenance of the children, but she has only just sufficient to support herself, and as the plaintiff is still a strong man he will by working a little harder now than he has done in the past be able to support the children and himself. I cannot help thinking that he has been a somewhat aggravating husband, and not very diligent or hardworking. He did leave his wife for over three years without much ado, and he is not therefore a man to whom the Court would be inclined to give heavy damages or order that his wife should assist him in supporting the children. It is his duty to work for them and maintain them at his own expense, and not to ask the wife to maintain them out of her slender means. Therefore that part of the plaintiff's claim cannot be acceded to. As to the claim for damages against the co-defendant, I do not think the co-defendant is a man of much means, and therefore the small amount of damages is not to be taken as a test of what the Court considers is the injury done to the plaintiff. The injury he has done is great, because I believe that the co-defendant has really, been the cause of all the trouble. He was a friend of the plaintiff's, and abused that friendship by using it to tempt his friend's wife. Seeing, however, that the relations between the plaintiff and his wife were not very cordial, it is not a case for heavy damages. The damages, however, will not be nominal, but at the same time they will not be vindictive. The judgment of the Court, therefore, is that a decree of divorce be granted, the plaintiff to have the custody of the children, but the first defendant to have access to them at all reasonable times and places; the second defendant to pay damages to the plaintiff in the sum of £50, and to pay the costs of the plaintiff, including personal costs.

Maasdorp, J., and Solomon, J., concurred.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorney, V. A. van der Byl; Attorneys for the Co-defendant, Messrs. Findlay & Tait.]

REGINA V. HAVER. { 1898. Dec. 2nd.

Act 23 of 1888, section 28.

This was a case which came up for review from the Resident Magistrate of Prieska. The prisoner had been charged with contravening section 28 of Act 22 of 1888, and convicted.

De Villiers, C.J., said: There was no evidence of the prisoner having "conspired or confederated" with any other prisoner to make the escape of either. He asked other prisoners to escape with him, but as they did not agree there was no conspiracy or confederacy. The 28th section of Act 23 of 1888, under which the prisoner was charged, makes no provision for the case of one prisoner "trying to incite another prisoner" to escape. The conviction must be quashed.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice) the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice SOLOMON.]

SONNENBERG V. HAARHOFF AND FINCHAM. { 1898. Dec. 5th.

This was an application for leave to amend the petition filed by the applicant against the return of the respondents as members of the House of Assembly for the division of Vryburg. It was proposed to add three names to Schedule A, paragraph 2, and in Schedule C to alter a certain number of the names, to expunge seven and add four new names.

An affidavit filed in support of the application alleged that it was rendered necessary in a great measure by the fact that some of the people who had been personated were so illiterate that their names had been incorrectly given.

Mr. Searle, Q.C. (with whom was Mr. Molteno), appeared for the applicant.

Mr. Graham, Q.C., for the respondents, objected to the additional names being inserted in the schedule. Only fourteen days were left in which to meet these new charges.

Mr. Searle: The same agents are concerned in the new charges as in a number of others on the schedule.

De Villiers, C.J., said: I think the Court should have all the information before it that is available, provided that the defendants are not in any way prejudiced at the trial, and if it should appear at the trial that the defendants would be prejudiced then of course these new charges will not be allowed. It is not clear that the defendants will be prejudiced in the present case, for it appears that the agents who are alleged to have given bribes in these new charges are the same agents who are concerned in other charges, so that I do not see what further evidence will be required except that of those agents who will be here. The amendments will be allowed, but there must be no further amendments, because the time is short. I think that the respondents should at once telegraph to Vryburg, and the fourteen days from now will be ample time to find evidence to meet the charges.

Maasdorp, J. and Solomon, J., concurred.

[Applicant's Attorney, V. A. van der Byl; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Justice SOLOMON.]

DUKE AND CO. V. A. R. MCKENZIE AND CO. { 1898. Dec. 5th. " 6th.

Dock agent—Damage to goods—Custom.

The defendants acting as dock agents received and loaded from a ship at the docks a cigarette machine packed in a wooden case and consigned to the plaintiffs. The plaintiffs' delivery agent subsequently removed the case from the defendants' store without any survey or examination having been *held, and without the defendants' knowledge. When delivered at the plaintiffs' store, both case and machine were found to have been damaged. It was the custom of the port not to recognise any liability upon the landing agent if goods were removed without his permission although they were subsequently discovered to be damaged.*

Held, *that this custom did not necessarily remove any liability if damage had actually been caused by the defendants, but that the onus of proving that the damage occurred while the goods were in the defendants' possession lay upon the plaintiffs.*

This was an action for damages caused by the defendant to a certain patent cigarette machine belonging to the plaintiff.

The declaration alleged that the Castle Mail Packets Company were the agents of the ship Munificent, of whose cargo the machine in question formed a part; that the said Castle Company, in terms of the 31st regulation of the Dock Regulations, framed under Act 22 of 1872, section 17, appointed the defendant a dock agent, and that the defendant received and landed out of the Munificent the package containing the machine; that by reason of and in terms of the Dock Regulations the defendant was the statutory agent of the plaintiff; that the defendant was negligent in the operation of receiving, landing, and handling the machine, and wholly broke it, and delivered it to the plaintiff in an utterly worthless and useless condition. The plaintiff claimed £176 5s. 8d., being its value, and £300, being the damage sustained owing to his being unable to have the use of the said machine.

The defendant in his plea denied that he was the plaintiff's agent, denied negligence, and specially denied that he had broken the machine. He said that he acted as stevedore in landing it, and on the 2nd September received notice from the Castle Company not to deliver it unless a proper order was produced, signed by the said company, and it thereupon became his duty to place it in the Harbour Board store on the quay, and he did so; that the machine was improperly packed, and had been received on the Munificent under a special clause in the bill of lading, that "the steamer was not responsible for the contents." He said further that the machine, if damaged, was not damaged while under his care and control; that the plaintiff and his agents had ample time and opportunity for examining it before taking delivery, and that it was the custom and rule, well known to the plaintiff, of the Docks at Cape Town that in case of any injury or damage to goods discharged from a ship under the circumstances aforesaid that they were not to be removed until a survey had been held, and the damage ascertained: that the plaintiff was not entitled to remove the machine without production of the order abovementioned from the Castle Company, but that by his agents he did inspect it before removal, did not claim any survey in respect of any damage, and wrongfully removed the machine without production of any order: wherefore the defendant said that he was released from all liability and responsibility. He also denied the amount of damage said to have been sustained.

The replication was general.

Mr. McGregor and Mr. Upington appeared for the plaintiff.

Sir H. Juta, Q.C, and Mr. Graham, Q.C., for the defendant.

William Schreiber, the plaintiff, said that he carried on business in Cape Town as a tobacco and cigarette manufacturer under the style of W. S. Duke & Co. Witness received a cigarette-making machine from New York by the steamer Munificent. He gave the work of clearing the case and delivering it at his place to Messrs. Duncan Brothers. When the machine arrived witness found a couple of boards out of the bottom side of the case. It was not what was known as a skeleton case. He went into the machine, and found loose pieces of machinery lying about. He then got eight coolies, and had the case carefully slid off the wagon and taken into his shop. The next morning, after all the boards had been taken off, witness found that the machine had been broken in several places. The case was a substantial one. The feet of the machine were secured to crossbars in the case by bolts, and one of those bolts was missing. He found an indentation in the case which corresponded with the broken part of the machine. The machine weighed 700 lb., and the case 300 lb. Subsequently witness and Mr. Duncan went to the Castle Company's office and saw Mr. Girdwood, who showed them a clean receipt they had got from Mr. McKenzie's clerk. He then showed them the discrepancy list, which contained an entry of one case consigned to W. S. Duke broken on quay. Three days after that Mr. McKenzie's claims clerk, Mr. Lindsay, came to witness's store, and speaking in connection with the claim said that as far as he could make out the case must while being taken from the quay to the Harbour Board's sheds, have fallen off the truck. Mr. Lindsay then left, but came back two days later and repeated what he had previously said as to the case having fallen off the truck, but added that as Duncan Brothers had removed that case without an order, the defendants did not hold themselves responsible. The machine was properly packed, in the usual manner in which such machines would be packed. A fall from a truck would be sufficient to cause the damage. The marks of the fracture of the machine were quite new. The machine might be repaired in Cape Town, but not without a great deal of trouble and expense. Two engineers had told witness that it would cost £40 or £50 to repair, and then they could give no guarantee that the machine would work properly. The machine would have saved labour to the extent of £3 10s. or £4 per day. Witness now had a similar machine working. It made 20,000 cigarettes per day, for which if hand-made they would have to pay 4s. per thousand to cigarette makers. On another occasion when Mr. Lindsay and some others came to witness it was again admitted that the case had slipped off the trolley.

Cross-examined: The case being turned upside down in this particular matter was not negligence, because the boards being away it was put in that position to prevent the loose parts tumbling out. If witness had been at the Docks he would not have accepted delivery of that case in its damaged condition. Part of the woodwork of the case had been burned by girls in witness's employ, although he had told them not to do so.

Robert Duncan, carrying on business as Duncan Bros., stated that the day after the delivery of the case he went with the plaintiff to the office of the Castle Company. Afterwards, he wrote a letter to Mr. McKenzie (correspondence between witness and Mr. McKenzie put in). Goods were generally examined in the importer's store when damaged.

Cross-examined: Witness had been a landing agent for over six years. Sometimes they removed goods from the Docks without drawing the attention of the landing agent to the fact that they were doing so. The Union Steamship Company had given compensation for damaged goods which had been taken from their store without permission. When goods were damaged, sometimes they wrote to the company's office for permission to remove them, and sometimes witness's manager at the Docks got permission from the company's clerk there. Witness did not know that freight had not been paid on this particular case. Without the order produced (dated October 6) witness had no right to remove that case from the shed. Witness was not aware that his manager had taken away the case when the back of the company's servants was turned. If a nail were noticed to be missing from a case it would be put down as damaged in the discrepancy list

Re-examined: Witness was not present when the case was removed from the Docks.

Walter Stone, manager at the Docks for Messrs. Duncan Brothers, deposed that the persons who loaded the case on to the wagon were coolies in the employment of Messrs. McKenzie. Witness accompanied the wagon as far his employers' offices at the corner of St. George's and Castle-streets. Nothing then happened to the wagon, and it was impossible for any damage to have then occurred. They were supposed to get an order from the shipping companies before removing the goods, but witness had sometimes taken away goods without that order.

Cross-examined: The case was standing the same way in the store as witness had put it on the wagon. Goods had before this been sent out, although damaged, but not cases of machinery.

Alexander Forsyth Girdwood, claims clerk in the employ of the Castle Company, identified the clean receipt put in as that given by defendants. It stated that the goods had been received in good order, and amongst those goods was a case for W. S. Duke. On the discrepancy list that case was marked as "case broken on quay."

Cross-examined: When goods had once been removed from the possession of the Castle Company and taken out of the Docks the company did not recognise any claims for compensation. That was the invariable rule and custom.

Paul Nowak, a practical engineer, deposed that he was with the plaintiff in his store when Mr. McKenzie was there. Mr. McKenzie admitted that the case had fallen off a trolley, and said that he was going to see Mr. Duncan to make him responsible for the breakage. The case was not a skeleton case, but a substantial one with cross-bars.

Cross-examined : Witness would undertake to repair the machine, but would not give a guarantee that it would then be in good working order. The repairs might take half a year. It would be an expensive job.

Edward Dreyer, a coloured wagon-driver, in the employ of Messrs. Duncan Brothers, deposed to the case being loaded up on the wagon he was driving. Mr. Stone was not with witness on the wagon. He joined them at Duncan Brothers' office. Witness had on the wagon some goods for Rosen Brothers, which were there unloaded on to another wagon. He off-loaded some goods at Garlick's. While witness was on the wagon nothing happened to the case. It did not fall off or topple over. It was not taken off the wagon from the time they left the Docks until they arrived at plaintiff's store.

Cross-examined : It was not a skeleton case. It was not very heavy.

Walter Stone (recalled) stated that there were other goods on the wagon for Rosen, of Sir Lowry-road, but these were transferred to another wagon at the corner of St. George's and Castle streets. The driver never went to Garlick's with any goods on that trip. Witness was certain he was on the wagon.

Abram Abrahams, in the employ of Messrs. Koch & Dixie, deposed that one day last September he assisted to off-load a case of machinery at the plaintiff's store. There were seven of them there altogether. The case was a heavy, strong case, but two planks were off the top. It was not a skeleton case. It was taken carefully off the wagon, and it was impossible that the machine could have been broken while it was being taken off the wagon.

Karl Kalbruken, clerk, said that he saw the machine in plaintiff's shop. Plaintiff said he had sent to the Castle Company. Lindsay, who had been sent to look at the machine and was present, said when it once left the ship the Castle Company were not responsible.

George Jupp, shipping clerk to Gates & Co., said it was customary to find out if a damaged case had been damaged in coming from the ship ; in that case the agent of the ship would be interviewed and a survey held at the Docks or at the consignee's stores. In case the landing agent had given the ship a clean receipt then arrangements could be made with the landing agent or the dock agent as to surveying at the Docks or at the stores : the ship would then be out of the case. If damaged goods were taken away by the consignee he did so at his own risk. The attention of the dock agent ought to be drawn to the damage. It was not necessary to mention in the discrepancy list where the goods were damaged. The discrepancy list should mention goods landed damaged from the ship. The ship had nothing to do with goods damaged after landing.

Cross-examined : The landing agent should have notice of the removal of damaged goods ; if notice were not given the party removing did so at his own risk and his claims were not recognised.

This closed the plaintiffs' case.

For the defence,

Frank Bishop, superintendent of the Union Steamship Company, said the custom of the port was that when goods were landed damaged, they were examined at the Docks or the stores : if goods were removed without consent this was taken as proof that they were in good order, and no company or dock agent would recognise liability. The clause " steamer not responsible " in the discrepancy list was unusual.

W. Sinclair, superintendent of the Castle Company at the Docks, gave evidence similar to that of the last witness.

William Stewart, shipping clerk to Messrs Searight & Co., gave similar evidence. Even if the article were on the discrepancy list his company would recognise no liability if it had been removed. The endorsement " broken on quay " appearing on the discrepancy list was to protect the ship.

Cross-examined : If the ship had a clean receipt the damaged article should not be put in the discrepancy list.

Tobias Spengler, manager to Bate & Co., gave similar evidence.

Arthur Mellish, shipping and landing agent, said he had had seventeen years' experience. He gave evidence similar to the preceding witnesses for the defence. He had once removed a damaged package without leave, and had had to bear the loss.

William Martin, delivery clerk to the defendants, said the case had been removed in his absence; he noticed no damage to it: if damaged it would have been put in the hospital, whereas it was not.

John Kendal said he saw the case removed from the store and saw nothing wrong with it, he would have noticed it if there had been a breakage. Stone was superintending and Stone was a very careful man. Stone had refused to take goods if damaged, even if there were no very serious damage. He had not pointed out any damage in this case.

Owen Harris, tally clerk to the defendants, said the case was landed and put on a hand truck about twelve inches from the ground; it was wheeled along: the case took a slide and came on its head at the side of the trolly: one side gave a bit of a cant over. Witness made the endorsement: the least damage was entered as "broken;" the case was not smashed: it was considerably smashed when he saw it at the plaintiffs' store. Stone was particular, and would not take damaged goods.

Cross-examined: Witness did not know there was a clean receipt: he signed the discrepancy list, he made out the discrepancy lists; "damaged on the quay" was put there to clear the ship. Witness did sign the clean receipt.

Amangnoot said he discharged the Munificent: a splint came off the corner of the case as it jammed against the stage: he saw no plank broken. There was nothing broken at the bottom: witness would have seen it if it was broken. Stone did not go with the wagon, he remained in the store some minutes after the wagon left.

Cross-examined: The case slipped off on the side: it never fell over; they went slowly; there was no breakage.

Mohamed Alli stated that he was in the employ of Messrs. A. R. McKenzie & Co. at the Docks. He, with others, assisted Mr. Stone to put the case on the wagon. He could see all round the case. When the case was standing in the store the number was on the top, and it was put on the wagon in the same position. It was put on a trolley, and witness saw the bottom. The only damage witness could see was a splinter on the side. No boards were loose.

Cross-examined: Witness was employed as a coolie. The splinter he saw was a small one and not worth talking about. Four men, including Mr. Stone, assisted in putting the case on the wagon.

Charles Sesame, a coolie in the employ of Messrs. A. R. McKenzie & Co., gave corroborative evidence. Mr. Stone did not go away with a wagon.

Swan B. Lindsay, a clerk in the employ of the defendant, said that his business was to inquire into any claims made for damage to goods. He went to Mr. Schreiber about the present claim. When he saw the case, he asked if it had been dropped in unloading but Mr. Schreiber said that it had not, as he and eight men had carefully unloaded it. Witness asked that because of the appearance of the case, the nails all being out as if it had had a fall; a person could not help seeing that the case was smashed.

Cross-examined: Witness denied that the first time he saw plaintiff he said the case had slipped off a truck. Witness did not know that himself at that time. The second time he was there he remarked that the case had slipped off a truck, and that a small piece of wood had been knocked off the corner of the case. He said, however, that as Mr. Duncan had shifted the case without authority Messrs. McKenzie & Co. would have nothing to do with it.

By the Court: They would call a case broken if there were a small splinter two inches in length, even if there were no nails out.

James Edward King, chief wharfinger at the Harbour Board, said that he had been employed at the harbour since 1870. On the ticket produced a note would be made whenever any damaged goods were taken away. If goods were taken away without the permission of the landing agent and were afterwards damaged, the invariable custom was that no claim for compensation was recognised.

William J. Perold, a practical engineer carrying on business in Cape Town, said that he had had twenty years' experience. He had examined the machine in question. It would cost £35 to repair it.

Cross-examined: Witness could not guarantee the repairs for £35. It would take three or four weeks to repair it.

By the Court: It would not require a particularly heavy fall to break the machine. It might possibly be caused by a fall of ten inches from a truck. Witness would have expected the machine to be in a stronger case.

William Beattie, a manager in the employ of Messrs. A. R. McKenzie & Co., said that he had been at the Docks eighteen years. If their clerk noticed anything at all wrong with a case it would be entered as "broken." Even a small splinter would be so entered.

Mr. McGregor: The onus is on the defendants, because of the extraordinary and unusual entry in the discrepancy list, of showing that the damage was not caused while the goods were in their custody. *Carr* v. *L. & N.W. Railway Co.* (44 L.J.C.P., p. 109). As to the damages, the machine cannot be properly repaired here and that fact must be taken into consideration. *Mayne on Damages* (p. 285).

Sir H. Juta was not called upon.

De Villiers, C.J., said: There is a great deal of force in the argument of the learned counsel for the plaintiff, that where there is a discrepancy in the evidence a written document such as this discrepancy list is of the greatest importance, and certainly upon this discrepancy list there is an admission on the part of the defendants that while this case was in their possession the case itself was injured. But if a written document is of importance as against the defendants, there is also another written document which is of the very greatest importance as against the plaintiff. I refer now to this document which was given by Mr. Stone, as representing Messrs. Duncan Bros., to the driver of the wagon which took the case from the Docks to the store. This is admitted to have been written by Stone, and states that the case containing machinery, addressed to W. S. Duke, was received in good order. Now, it is admitted on all sides that Stone was a very careful man, and I am quite satisfied from the evidence that if Stone had found this case in the condition in which it was afterwards said to be found by Mr. Schreiber, he would not as a careful man have allowed it to be removed from the Docks. It is a strange thing that in his examination-in-chief Stone said nothing whatever about the condition of the case as he found it at the Docks. It was only in his cross-examination that he stated that it was already in that condition. Now, tracing the case to the possession of the plaintiff himself, the plaintiff says that when he found it the bottom part was standing up and two planks were altogether away, so that you could look into the case. But another witness whom he called, and who had assisted him to take the case from the wagon, says that when it was on the wagon the two planks were loose, but the nails were still in their places; that the nails were a quarter of an inch in, and the planks were only started: this seems to me to be another important discrepancy in the evidence. I cannot agree with Sir Henry Juta in the view that because a certain custom has arisen at the Docks by which persons who are in charge of goods, either shipping agents or shipping companies, refuse to be bound, or refuse to hold themselves liable in case the goods are removed in an apparently damaged condition that they are not therefore liable. I can quite understand that they might refuse to hold themselves liable, but it is for the Court to decide in every case whether that refusal is justified or not. The mere fact that for a long period of years people have said "We refuse to hold ourselves liable" is not enough to avoid the liability. It would still be for the Court to say whether under all the circumstances of the case they had cleared themselves of liability. If in this particular case it had been clearly proved to the satisfaction of the Court that while in the possession of the defendants damage had been done to this case, and that the goods it contained had been injured, the Court would, in spite of that custom of the Docks, have said that McKenzie & Co. were liable. There is no doubt, however, that that custom as to responsibility throws the whole onus of proof on the person who claims damages. In the present case the Court would hold that it lies upon the plaintiff, who has by his agent removed these goods from the Docks, to prove that while the goods were in the possession of McKenzie & Co., not the case only, but the machinery inside was injured. The discrepancy list shows that some injury was done to the case, but there is still a discrepancy in the evidence as to the amount of the injury. I am inclined to think that the defendants somewhat minimise the amount of that injury, and I do not think a mere splinter broken off a case would justify the statement in the discrepancy list that the case itself was broken. The question still remains as to the amount of the damage, because that does not necessarily prove that the machinery inside the case was injured. That shows the importance of allowing an examination to be made inside the case as to any damage. No such examination was made, and the Court is at present left entirely in the dark as regards that. Mr. Stone has said that he accompanied the wagon from the Docks to the office of Duncan Bros. That would account for part of the road, but still the injury may have been done after leaving Duncan Bros., and before the wagon reached plaintiff's store. But the driver himself denies positively that Mr. Stone accompanied the wagon, and his denial is corroborated by the evidence of the coolies at the Docks, who said that Mr. Stone did not accompany the wagon. Of course, it was of importance to Duncan Bros. to prove that the injury could not have been done after the case left the Docks, and while Mr. Stone did not perhaps intentionally say what was not true, his recollection may have been somewhat in their favour. The weight of the testimony is in favour of the view that Mr. Stone did not accompany the wagon. Now, the Court is quite satisfied that the onus of proof lies upon the plaintiff, even if it be shown now that this damage was done after the goods came into the possession of McKenzie & Co. The Court has not, however, to decide whether it was done before or after. It might have been before or it might have been after, but when one remembers the many hands goods passed through, it would be almost impossible to decide when the damage was done. When one considers how it came from America, probably treated carelessly on board, thrown into a hold and then carelessly taken out, one can see how many chances there were of the case being broken in some of those different stages of the journey. Of course, in the present case there is the circumstance that the damage seems to have been recent, and therefore possibly might have occurred while the case was in the possession of McKenzie & Co., but it is also reasonable to believe that it might have been broken on the way from the Docks to the plaintiff's store, because when the witness called for the plaintiff examined it two days after it had been delivered at plaintiff's store, he said that the injury appeared to be two days old. Under all these circumstances, there seems to be no other course than for the Court to give absolution from the instance with costs.

Maasdorp, J. and Solomon, J. concurred.

[Plaintiffs' Attorneys, Messrs. Innes & Hutton; Defendants' Attorney, C. C. Silberbauer.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

Ex parte GARLICK AND OTHERS, *in re* JACOBSON. { 1898. Dec. 6th.

Insolvent — Fraudulent insolvency —Arrest.

A warrant for the arrest of a person charged with fraudulent insolvency may be issued before the provisional order for the sequestration of his estate has been confirmed.

This was an application for the arrest of one Jacobson, who was alleged to have fled the country in order to escape his creditors. The debtor had recently obtained damages from the Tramway Company in respect of an accident he sustained while getting on a tram, and it was alleged that he had taken that money with him, although it was the only asset in his estate.

A provisional order for the sequestration of his estate had been granted by the Chief Justice (in Chambers) on December 1. He was then charged with fraudulent insolvency by reason of his having removed portion of his estate with the intention of defrauding his creditors, and also with culpable insolvency by reason of his not having kept proper books. An application had been made to the Chief of Police for a warrant, but he had refused to issue one, on the ground that he had no power to do so until the provisional order of sequestration had been confirmed. An affidavit by Joseph Marshall alleged that Jacobson did not get on very well with his wife, and that he had told her that he would leave her, and further said that he would have to pay his creditors with the damages awarded him by the Court.

It was further alleged that friends of the debtor intended cabling to him at Madeira, at which port the steamer on which he left this country was expected to touch to-day, to warn him that steps were being taken to effect his arrest. Therefore the warrant was asked for so that he might be prevented from leaving the ship at Madeira.

Sir H. Juta for the applicants: According to section 70 of Ordinance 6 of 1843 it is not necessary to wait for the confirmation of the order.

De Villiers, C.J., said: This is a very exceptional application—an application for a warrant for the arrest of a criminal. No doubt the Court has the power to issue a warrant of this kind, but it is a power to be exercised in very exceptional cases, where the ordinary means of obtaining warrants are not available. In the present case I do not see why the Magistrate should not issue a warrant in the ordinary way. If the Chief of Police has refused to issue this warrant because the provisional order of sequestration has not been confirmed, I think he is mistaken, for I see no reason why he should wait for that, unless he was fortified by some authority not yet produced, and of which I am not aware. At present I see no reason why a warrant should not issue. Of course the warrant will fall to the ground if the provisional order is not made absolute, but on any provisional order there is at least a *prima facie* case. Therefore no order will be made on this application.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice MAASDORP.]

ROBINSON V. CARTER'S TRUSTEE AND ARMSTRONG.
1898.
Dec. 6th.

Mr. Searle, Q.C., applied on behalf of the plaintiff for a commission *de bene esse* to take the evidence of one Eitner, a material witness who was alleged to be too ill to attend at the trial of the cause. It was suggested that the evidence should be taken before the Resident Magistrate of Hope Town.

Sir H. Juta, Q.C. (for the defendants), opposed the application on the ground that it was important that Eitner's evidence should be given in open court; that it was necessary in the interests of the defendants that he should be cross-examined by someone well versed in the facts of the case; that there were no legal practitioners at present in Hope Town, and that the time did not allow of proper arrangements being made for such cross-examination.

The Court refused the application, but, the parties consenting, ordered that the judges' notes of the evidence of Eitner in the case of *Regina* v. *Carter and Armstrong* should be taken as evidence in the action if Eitner should still be too ill to appear.

KOHNE V. HARRIS.
1898.
Dec. 6th.
" 22nd.
" 23rd.
1899.
Feb. 13th.

Drainage—Discharge of water—Canal—Negligence.

The defendant constructed a canal on his land for drainage purposes, which collected a large quantity of water in an unaccustomed channel and discharged the water at the lowest portion of his land.

Owing to faulty construction a breach occurred, after a heavy rain, at the side of the canal causing a flow of water from the canal across a public road on to the plaintiff's land.

The water discharged at the lower end of the canal met with obstruction on the land of a third person and was thrown back, in a manner that ought to have been forseen, on to the plaintiff's land.

Considerable damage having been done to the plaintiff's land,

Held, *that whether such damage was caused by the flow from the breach at the side of the canal, or by the water being thrown back by the obstruction, or by both causes combined, the defendant was liable for the damage caused by his negligence.*

This was an action for damages caused by the overflow of water from the property of the defendant to the property of the plaintiff, and an interdict.

The plaintiff's declaration was in the following terms:

1. The plaintiff is a farmer living near Wynberg, in the Cape Division; the defendant resides at Rondebosch.

2. The plaintiff is the owner of certain quitrent ground, being the remaining extent of lots E, F, and G, near the Rifle Range on the Wynberg Flats. The defendant is the owner of the farm Bamboes Vley and certain land adjoining it. Portion of the defendant's property adjoins the land of the plaintiff on the northern side, but is divided from it by a public road.

3. Upon the defendant's land there are two vleys or pools, which receive the drainage from that land, and also from land situated to the westward of it; the said vleys are often dry in summer, but they contain large quantities of water during the wet season of each year.

4. A certain quantity of water has always in winter flowed from the upper of the two vleys down to the lower one, and thence over and beyond the defendant's property in a south-easterly direction. The channel which thus drains the two vleys is known by the name of the Driebooms River, and no water flowing in the said channel could by any possibility reach the land owned by the plaintiff.

5. In or about the month of April, 1898, the defendant, in order still further to drain the lower of the said two vleys, dug a wide channel or furrow from the said vley down to the southern boundary of his property, and thence in a westerly direction running parallel with the northern boundary of the plaintiff's property. The said furrow during a considerable portion of its course is separated from the plaintiff's land only by the public road hereinbefore referred to. The said furrow terminates at the south-western corner of the defendant's property at a distance of about forty feet from the north-western corner of the plaintiff's land.

6. The necessary result of the construction of the said furrow must be and is to lead large quantities of water from the said vley to a spot close to the plaintiff's land, which it would never have reached by the ordinary and natural channels of drainage. Yet the defendant failed and neglected to make any due and proper provision for disposing of such water when it reached the boundary of his property, so as to prevent injury to the neighbouring land, including that owned by the plaintiff.

7. In or about the second and third weeks of July, 1898, a large volume of water flowed from the said vleys on the defendant's property through and along the furrow aforesaid. The said furrow had been so negligently and improperly made by the defendant that it was not able to carry off the quantity of water which flowed into it, and at a certain point in its course some of the water overflowed the banks of the said furrow, and flowed over the public road aforesaid, and on to the land owned by the plaintiff as aforesaid.

8. When the water which remained in the said furrow reached the end of it, and crossed the boundary of the defendant's property it overflowed and ran into and upon the plaintiff's said property, and a large portion of the said property as well as the surrounding ground and the public road adjoining was submerged.

9. The effect of the overflow of water on to the plaintiff's property at the two places referred to was to cut up his roads and gardens, to destroy his crops, and to injure the foundations of certain three houses which were then being erected by the plaintiff. And the damage so caused was due to the wrongful conduct and negligence of the defendant in the construction of the furrow as aforesaid, and in making no sufficient provision for the disposal of the water after it flowed over his boundary.

10. The plaintiff estimates his damage at the sum of £500.

The plaintiff claims: (*a*) An order interdicting the defendant from allowing water to flow in the furrow aforesaid until he has made due and proper provision for the disposal thereof, so as not to injure the land owned by the plaintiff; (*b*) payment of the sum of £500 as damages aforesaid; (*c*) alternative relief: (*d*) costs of suit.

The defendant in his plea denied that the Driebooms River was able to take off all the water collected in the upper of the two vleys, and also denied the allegation in the declaration that no water flowing by that channel could reach the plaintiff's land. He admitted paragraph 5 of the declaration, but as to paragraph 6, said that the spot to which he led his water was the lowest portion of his farm, and that he made every proper provision for disposing of the water when it reached his boundary, so as to prevent injury to the neighbouring land. He further said that the water drained off by him would naturally flow to a drain below his and the plaintiff's land; that previous to July, 1898, the Wynberg Municipality had placed a 12 inch pipe in the drain, and the Colonial Government had constructed a hard road running from the drain up to and alongside the plaintiff's boundary; that in July there was an exceptionally tempestuous and violent downpour of rain, and a large and exceptional quantity of water collected on the defendant's land and in the vleys, and a large quantity flowed down the furrow; he admitted that some water flowed over the public road and on the plaintiff's ground, but denied that it was on account of the negligent construction of the furrow. He denied the damage alleged to be suffered.

Mr. Graham, Q.C.. and Mr. Gardiner appeared for the plaintiff.

Sir H. Juta, Q.C., Mr. Ward, and Mr. Benjamin for the defendant.

The facts appear sufficiently from the udgment.

Mr. Graham in argument referred to *udolph* v. *Wegner* (J. 6, 193).

[De Villiers, C.J.: The question is whether order to take the water to the lowest ortion of his property, the defendant was istified in taking the water out of its itural course.]

Mr. Graham: At common law he has no ch rights. *Angel on Watercourses* (section D and section 108J); *Martin* v. *Riddle* Penn. St., 415); *Kauffman* v. *Griesemer* Penn. St., 407): *Butler* v. *Peck* (16 io. St., 334).

[Maasdorp, J.: In all those cases the water was deliberately thrown on the plaintiff's land, here it was attempted to keep it off his land; it is said that the damage was caused by an unusual flood.]

The break cannot have been caused by the flood; the damage was really caused by the improper construction of the canal. *McCormick* v. *Horan* (37 Am. Rep., p. 479); *Pettigrew* v. *The Village of Evansville* (3 Am. Rep., p. 50). The doctrine laid down in those cases is similar to that laid down in *Ludolph* v. *Wegner*; *Digest* (39, 3, 1); *Pothier's Verhandeling van Societeiten* (p. 216).

Sir H. Juta addressed the Court upon the facts.

De Villiers, C. J. said: I quite agree with Sir Henry Juta that there is nothing *per se* illegal in a person draining a vlei upon his property; on the contrary, it is good husbandry to drain a vlei for the purpose of better cultivation. It is good for the country that there should be people enterprising enough to drain their properties, in order to bring them into a better state of cultivation. But then there is the rule that every person should so use his own property that it does not injure his neighbour's, and, as is said in one of the cases cited, that persons should not, in order to make their own property more valuable, make their neighbour's less valuable. Every person should have due regard for the rights of others, and this rule applies especially to cases where a person by improving his own land injures his neighbour by water. In the present case, what the defendant did was to make a canal by means of which he could drain off more water from the Bamboo Vlei than he could by ordinary means. The natural drainage of this vlei is by way of the Drieboom River, but the level of this river is not such as to enable the defendant to drain all the water from his vlei by its means, and he could not come upon the land of the proprietors, over which the Drieboom River flows, in order to deepen that river. Therefore he took the more natural course of deepening the level of the vlei at a certain point, of making a canal, and then bringing that canal down to the lowest point of his land. So far there is nothing necessarily illegal in that. But the mistake which the defendant made was not to make sufficient provision for the water at the point where it left his land. He simply brought it to the road, and there he left it to find its outlet as best it could. Now I think that any person who inspected the land at the time that the canal was made would have seen that the natural result of carrying the vast quantity of water which comes down that large canal and drains that vlei, quite independent of excessive rainfall, would be to spread it over the country, and the lie of the plaintiff's land at that part was such that the water would be thrown back, and go upon the plaintiff's land. That is what actually happened. Some question has been raised as to whether the action of the Divisional Council did not contribute to the throw-back of the water upon the plaintiff's land, but I think that it is in evidence that the road and the bridge and also the culvert were in existence at the time when the canal was made, and, therefore, the defendant in making the canal ought to have foreseen, that the necessary consequence of carrying off this vast quantity of water at a lower point would be that the water would spread over the country, and be thrown back upon the plaintiff's land. This is what happened, and a portion of the damage done is undoubtedly due to the water being so thrown back. But then there was another way in which damage was caused. The water did undoubtedly reach plaintiff's land in large quantities, and it was at that point that the breach occurred. The defendant had a right to make this canal, but he made it in such a way unfortunately that it injured his neighbour, and he might have foreseen that at that point where the water had formerly crossed over the land in small quantities, at right angles to the canal, the same thing might happen again, and that the result might be a breach there. That breach occurred, and I am quite satisfied that through that breach an enormous quantity of water came upon the plaintiff's land, which would not in the ordinary course have reached it. One can understand that a large canal like this must carry a large quantity of water, and that this breach having once occurred, and débris having been possibly carried into the canal at that point, the overflow must have been very great. Fortunately in regard to this overflow, the Court has not to depend upon the mere statements of witnesses. We have here a photograph, a very good photograph, taken several days after the flood, and even then, when one would suppose that the rain-water would have flown down, we find that there is a very strong stream coming from the canal right on to the plaintiff's land. The photograph is exceedingly well taken, and everything shows that the current was very strong, and that there was a considerable stream of water coming direct from this canal over the road right on to the plaintiff's land. The lie of the land there is clearly such that any overflow from the canal would flow down on to the plaintiff's land. The stream flowed in that direction, and this overflow at the point indicated simply took the natural course of the stream, and went on to the plaintiff's land. These are matters which might have been seen and provided against, but sufficient care was not taken by the defendant in the construction of this canal, and the question now is, who is responsible? Surely the person who has done this act in a negligent manner, the person who has not provided against damage which he could reasonably have foreseen—surely he is the person to suffer for it. These are the principles upon which a case of this sort ought to be decided. The only question that remains to be considered is, what damage has been sustained? The plaintiff has sustained considerable damage, but it is not quite clear that all the damage which he has sustained was caused by the defendant's water. It is quite probable that with the rainfall there may have been some other water in what is usually a vlei in winter, but not so much as there was when the defendant's water was running there. In winter a certain portion of the plaintiff's land does become a vlei—a smaller portion of the land; in consequence, however, of the defendant's conduct, that vlei was larger this season than it usually is. I think that upon the whole we may take it that £25 fairly represents the damage which the plaintiff has sustained by reason of the negligent manner in which the defendant has done this work, and for that amount, I am of opinion, judgment should be given for the plaintiff. Well, then comes the question of the interdict, and the difficulty with this interdict is that it might somewhat interfere with the defendant's use of this canal, even although due and proper provision is made. The best test whether due and proper provision is made will be after the rainfall. There will be considerable risk on the part of the defendant in not at once taking all the steps which are necessary for the purpose of providing for the disposal of this rainfall, but it would be difficult for the Court, if the question were to arise, to decide whether due and proper provision has been made. Now, there is no question in this case as to the defendant's ability to pay any damages which may be sustained hereafter. If he does not make sufficient provision, then of course he will again be liable for damages, and this liability for damages will of course induce him to lose no time in making due and proper provision, and so, as there is no question of the defendant's ability to meet any damages which may be sustained, we think it would be better not to grant an interdict in the present case. The plaintiff will therefore be entitled to £25 damages, and costs, the costs to include the costs of the surveyor (Watermeyer) and the engineer (Olive).

Maasdorp, J., concurred.

[Plaintiff's Attorney, A. Steer; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton].

SUPREME COURT

[Before the Hon. Mr. Justice SOLOMON and a Special Jury.]

ROBINSON V. CARTER'S TRUSTEE AND ARMSTRONG.

1898.
Dec. 7th.
" 8th.
" 9th.
" 12th.
" 13th.
" 15th.

This was an action for the rescission of a contract entered into between the plaintiff and Carter and Armstrong for the purchase of certain shares together with the option of taking up further shares in a syndicate formed in connection with the Roodedam diamond-mine.

The declaration alleged:

2. That about March, 1898, Carter and Armstrong were the joint owners of certain shares in the "Roodedam Prospecting Syndicate."

3. That this syndicate was formed about February, 1898, for the purpose of prospecting the farm Roodedam for diamonds, &c., and of acquiring the option to purchase it. And that prior to April, 1898, the syndicate had acquired the right to prospect the farm together with the option of purchase thereof, including the right to work any mines that might exist thereon.

4. That about the 4th April, 1898, Carter and Armstrong sold to the plaintiff five shares in the syndicate for the sum of £90,000.

5. That prior to the sale they had represented to the plaintiff and one Ferguson, the plaintiff's agent, that a valuable diamond mine existed on the farm containing 800 claims; that certain bore-holes had been sunk in the mine to a depth of 18 feet, and that they were sunk in yellow diamondiferous ground; that they, Carter and Armstrong, had found diamonds weighing 102 carats upon the farm; that the said diamonds which were exhibited to the plaintiff and Ferguson had been found in washing from 105 to 108 loads (a load containing 16 cubic feet) of soil taken from the said farm, and that certain of these diamonds had been taken out of a well upon the said farm about 40 feet in depth.

6. That acting solely upon the faith of the said representations, the plaintiff agreed to purchase the five shares for £90,000.

7. That the said representations were false and fraudulent to the knowledge of the said Carter and Armstrong; that there was no diamond mine upon the farm, the bore-holes had not been sunk to a depth of eighteen feet or to any depth greater than six feet; they had not been sunk in yellow diamondiferous soil; none of the diamonds exhibited as aforesaid had been found upon the farm, nor had any diamonds at all been found by Carter and Armstrong either in the well or elsewhere upon the farm.

8. As soon as the said representations were discovered by the plaintiff to be false, namely about May 2, 1898, he repudiated the contract.

9. That in consequence of the said false and fraudulent representation the plaintiff was entitled to a rescission of the contract.

Wherefore it claimed a rescission, &c.

And for a further claim, the declaration alleged that even if the said representations were not false to the knowledge of Carter and Armstrong, yet the plaintiff was entitled to a rescission of the contract on the ground that they were material and were false.

The defendants excepted to paragraph 7 of the declaration as being vague, embarrassing and inconsistent, and excepted to the second claim of the plaintiff as being bad in law and disclosing no cause of action.

In their plea:

1. They admitted paragraph 1 of the declaration.

2, 3, 4. They admitted paragraphs 2, 3, and 4, with certain exceptions.

5. They denied the allegations in paragraphs 5, 6, and 7, save as hereinafter excepted, and they said that prior to the 4th April the plaintiff had despatched agents to the farm Roodedam, who had every opportunity of inspecting the same and the operations carried on thereon; that in the month of March the Government of the Colony despatched one Franklin to inspect the farm and operations, and the said Franklin inspected, and publicly and to the Government reported that there was a valuable diamond mine of large extent; that prior to the 4th April the plaintiff despatched his agent Ferguson, a person well versed and experienced in diamond mines and digging, to the said farm and that he had every opportunity of inspecting it and the yellow ground well, and bore-holes, and did so; that prior to entering into the said contract the plaintiff had every opportunity of inspecting the farm and operations, and of communicating with other persons, who had every opportunity of doing the same and who had

inspected, and that it was in consequence of the aforesaid premises and not upon the faith of any representations made by Carter and Armstrong that the plaintiff entered into the contract: that no representations were made by Carter and Armstrong with the object of inducing the plaintiff to enter into the contract, they being unwilling at the said date to sell their shares to the knowledge of the plaintiff; and that the plaintiff was not induced to buy the shares by Carter and Armstrong, but that the latter were induced to sell them by the plaintiff.

6. They denied that any representations made by Carter and Armstrong were false or fraudulent, or were so to their knowledge. They denied that they represented that there was a valuable diamond mine containing 800 claims, and they denied that there was no diamond mine upon the farm. They denied that they represented that bore-holes had been sunk to the depth of 18 feet, or that they were sunk in yellow diamondiferous ground; they said that they represented that certain drill-holes were sunk in yellow ground, and that they *bona fide* believed that it was yellow ground and denied that it was not so. They denied that none of the diamonds exhibited by them had been found on the farm; they denied that they represented that any of the diamonds exhibited had come from the well, and denied that the shares of the syndicate were of no value, but said they were at the said time of great value.

7. They admitted the repudiation of the contract, but save as above denied paragraphs 8 and 9, and said that the plaintiff had been guilty of gross *laches* in taking no steps to repudiate it after the 2nd May. For a claim in reconvention they prayed for an order for the payment of the sum of £90,000.

The plaintiff in his replication (paragraph 3) admitted the despatch of Ferguson to the farm to enter into negotiations for securing the option of purchasing any diamond mine that might exist thereon, as also the despatch of Franklin by the Government, &c., but said that Carter deceived Franklin by certain false and fraudulent representations.

Mr. Innes, Q.C. (with whom was Mr. Searle, Q.C.), appeared for the plaintiff.

Sir H. Juta, Q.C. (with whom was Mr. Currey), for Carter's trustee.

Mr. Burton (with whom was Mr. Upington), for Armstrong.

Benjamin Reid, managing director of the New Bultfontein Company, said he had had considerable experience in diamond mining, and knew Carter and Armstrong,[*] who were both men of great experience in diamonds. Witness had never known diamonds to be found without diamondiferous deposit. He went down to the Hope Town mines on March 27, despite the fact that the defendants had told him it was useless to go down as he would not be admitted to the mines, and that their order would be useless. The defendants turned up on the same day and he (witness) proceeded to inspect the farm in their company. At the bottom of one of the cuttings witness thought he saw yellow ground. Pointing to the east, Carter told him they had bored in several places into yellow ground and at one spot in the same direction they had struck reef. He heard a rumour that the mine would be offered to De Beers. Witness bought a share in the syndicate from Hampson for £25,000, but afterwards settled by paying £21,000. Witness extended his inspection of the farm and found rock in several of the borings.

Cross-examined by Sir Henry Juta: Witness did not see any difference in the nature of the ground inside the fence and outside. He was satisfied from the ground inside the fence on the side of the paddock that it was yellow ground.

Re-examined: His reason for pressing the defendants to dispose of the farm to De Beers, was because he was interested largely in low grade properties in Kimberley, and any new mine purchased by De Beers would tend to keep up the price of diamonds.

Frederick Emil Schmidt, land surveyor, qualified in Natal, and in the service of the Langlaagte Estate, stated that he arrived at Roodedam on April 25, when the farm was already fenced in as shown on the plan produced. He proceeded to give a detailed account of his survey of the mine.

By Mr. Searle: 933 claims, 30 feet by 30 feet, comprised the total area as shown on the plan.

By Sir Henry Juta: Witness took the boy "Willie" from Hope Town to Johannesburg to assist him on the estate because he was a smart boy. He paid the boy for the few days he was with him, but he was really entitled to such assistance at the cost of the estate.

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[*] (Note.—For convenience, Carter and Armstrong are referred to in the report as the defendants.)

James Ferguson, a brother-in-law of the plaintiff, and managing director of the Robinson group of companies, gave evidence as to his visiting the Roodedam farm on April 1, when Armstrong and Carter together showed him over the farm. Armstrong did most of the talking, and scraped the soil away in one or two cuttings, exposing red streaks, which he remarked was a good sign. After thoroughly inspecting the soil and excavations, witness returned to Armstrong's room, where he was shown a parcel of diamonds taken from the farm, the largest of which weighed 3½ carats Witness here told Armstrong that Mr. Robinson would not deal in the matter unless he had a controlling share. Armstrong said he would confer with Carter, and leaving witness in the room talked with Carter outside. Nothing definite was then agreed upon, as Mr. Robinson was on his way to Hope Town, and witness left later in the day to meet him. He met Robinson, and subsequently he and Robinson met Carter and Armstrong in a private room at Krankuil. Armstrong showed Robinson the diamonds and said that they represented 105 to 108 loads; also that the size of the mine was 800 claims. The largest stone, he said, came out of the well.

Referring to an excavation marked 31 on the plan, witness said before the farm was surveyed by Mr. Schmidt, a hole was made in this spot by boys, under his direction, with old shovels. After excavating the soil to the extent of a few feet, he was satisfied that it was an old excavation. He came to this conclusion because, as the soil was thrown out, at varying depths lime and sandstone were found intermingled in lumps, and of a loose character. He purposely gave the boys simply old shovels to ensure new ground being kept intact. A similar hole was subsequently found beneath a spot pointed out by "Willie," and which was covered with ashes from a Kafir fire. Witness was absolutely confident that the holes had been previously excavated and filled in again. Witness made a later and exhaustive examination of the farm, and after consulting with Mr. Robinson any agreement to purchase from the defendants was repudiated.

By Sir Henry Juta: Witness had resided in Kimberley for about fifteen years. Mr. Robinson was always prepared to institute examinations of new prospects, and witness was generally deputed to make the inspections. He investigated the Roodedam farm, and went down and looked for himself, taking no letters with him. He saw several bore-holes. They were not easy to drill. It would take the cross-examiner, Mr. Burton, and two boys to drive a bore. The bore-holes were only an inch and a half in diameter. When yellow ground was spoken of by mining people, diamondiferous soil was always understood. Witness saw soil taken from the north end of the farm, and after being picked it was placed in the washer, but no one was allowed to see the washing. Witness had his suspicions first aroused on this occasion.

By Mr. Burton: After investigating the farm, witness came to the conclusion that there were about 700 claims. Several of the bore-holes in the inner circle were from 3½ to 13 inches only in depth. Witness subsequently spoke to Armstrong with regard to his taking over the management, and Armstrong said he was about to journey to Natal, and would take two weeks to think over it. The matter was never settled.

Re-examined: Witness's calculation of 700 claims was the result of a rough examination, and if Armstrong said there were 800 claims he would be quite consistent. He took Armstrong's word for the depth of the bore-holes. It was a common thing to find gravel and diamondiferous soil lying round the top of a mine in small quantities.

Walter Carmichael, clerk to the Resident Magistrate at Kimberley, identified a sealed packet of diamonds produced at the criminal trial, *Regina* v. *Carter and Armstrong*.

Peter K. A. de Vos, clerk in the Attorney-General's office, deposed that he received the parcel of diamonds produced from the Resident Magistrate of Kimberley. (The diamonds produced were those alleged to have been found on Roodedam.)

Joseph Benjamin Robinson, the plaintiff, stated that he was one of the oldest diamond diggers in the country, having been connected with the industry for twenty-one years. He first heard about the Roodedam mine in March last from Mr. Celliers. He went to Johannesburg, and sent Ferguson down to see the prospect, with the object of securing an interest. In consequence of a wire he received from Ferguson he went down, and met him at De Aar. They discussed the matter at Krankuil with the two defendants in a private room. Witness asked them to describe the whole position of the mine, and Armstrong produced a parcel of diamonds, which he said weighed 102½ caracs, and had been found in 105 to 108 loads of soil. Some of the diamonds produced were very much like the larger stones in the parcel to which he drew Armstrong's attention, but he could not swear to the whole parcel. Ferguson said he made the number of loads washed 130, he having measured the hole from which ground was taken. Armstrong said that there was some of the top ground from the hole which they had not washed. Witness drew the defendants' attention to some larger stones, and Armstrong said he had found those diamonds in a well which had been sunk by a former owner, and added that that was an indication that the deeper they went the better the quality of the diamonds would become. Witness then asked the size of the mine. and they said it was 800 claims, although one member of their syndicate declared there were 1,000. Armstrong said they had arrived at the calculation that there were 800 claims by means of some bore-holes they had sunk. Armstrong then drew a rough sketch of the mine. As a rule, the yellow found on the sides of a mine was much richer than that in the centre, and seeing that the paddock was nearly in the centre of the mine witness knew that if that were a mine it would probably be much richer in the yellow outside the paddock. They assured him it was a genuine mine. Witness then detailed the negotiations. He wanted an option of a month, so that then statements could be verified, but they would not agree to that, giving such a plausible reason as to its being against the desire of the syndicate that he accepted every word they said as true. Witness made an offer of £75,000, which was not accepted. He then offered them £80,000, and also offered if they won the lawsuit pending against the Government to give them £100.000. Ultimately witness asked them to give him a day's option, so that he could test the mine, but they would not do that, using the same arguments as before. At last witness agreed to the price suggested by Armstrong, £90,000. He believed Armstrong; in fact Armstrong completely carried him away. He offered him until evening, but witness said he accepted their assurances. They wanted the money the next day, but he said he could not let them have it until the transfers had been arranged. On April 6 witness put on record all that had taken place. That was in a letter to his bank in London. About the end of April witness showed Ferguson some soil which Smith had given him. In that they found no diamonds, or trace of diamondiferous deposit. There were no diamondiferous indications whatever. Witness had never known a mine in which diamondiferous ground was found without deposit. The only test as to whether yellow ground was the real diamondiferous yellow ground was by washing, when the deposit would be found. Witness wrote a letter on May 2 repudiating the contract. Then the authorities took up the matter, and brought a charge of fraud against the defendants. Before the criminal trial witness took no steps with regard to the boy Willie. After the criminal trial he made inquiries as to what had become of Willie, and receiving a reply made arrangements for him to go to Langlaagte, where he had been since the criminal action, and until now.

Cross-examined by Sir Henry Juta: Witness had known cases where ground had been supposed to be diamondiferous, but had afterwards turned out not to be so. When he heard of a diamond mine he sent one of his representatives down to try and obtain an option. Witness would buy upon his representative's representation if he knew that the representative had had an opportunity of testing the property. and so was able to tell exactly what the property consisted of. Witness had arranged with Dr. Smuts and Mr. Celliers to go up and try to secure an option, but they were unsuccessful. He did not remember reading in the newspapers that Mr. Franklin had been to the mine, nor had he read that gentleman's reports in the newspapers. Although Franklin had been for twenty-two years Inspector of Claims at Barkly West, the first witness heard of him was when the defendants told him they had washed some ground for him. Witness might have read the newspaper reports regarding Roodedam, but they made no impression whatever upon his mind. When he met the defendants at Krankuil they were willing to go out to the farm with him. He did not go then, because they wished to discuss the matter, and try to get an option. They discussed the matter from nine till two o'clock. Defendants were willing to sell, but they would not give an option, except from two till seven o'clock, during which time he had an option to purchase. The object of that was that he might go out and see the mine, but it was two o'clock, and as he had been told the mine was four and a half hours from that place, it was no use going out there then. With regard to the bore-holes, witness had never heard of yellow ground out of a bore-hole being washed. His supposition was that the yellow ground in those bore-holes was diamondiferous when they had the paddock near, and the ground which was said to be diamondiferous. That was a mere assumption on his part. With regard to the diamonds said to have come from the well, the defendants did not tell witness that they had themselves taken any soil out of the well. Witness was generally very careful in mining matters. He did not agree with the opinions of Mr. Franklin and Captain Quentrall that Roodedam was simply a diamondiferous wash of varying depth from some dry mine, possibly in the near neighbourhood. That was not possible.

By Mr. Burton: At the interview at Krankuil he was positive that Armstrong said the bore-holes were 18 feet deep. It would have been the same if they had sunk four or five feet in yellow ground. As far as witness's experience went he would not express an opinion from seeing yellow ground as to whether it was or was not diamondiferous yellow ground. Witness had heard from Mr. Percy Greathead about a former option over the farm Roodedam.

Re-examined: There was some non-diamondiferous ground, which to the eye would look like diamondiferous yellow ground, and concerning which he would not express an opinion until a test had been made.

By the Court: The essential representations on which he was induced to enter into that contract were first that regarding the size of the mine, and from what defendants told him regarding the sinking of the bore-holes he gathered that the mine contained somewhere about 800 claims. The second essential representation was that about the yield of the mine. From those two representations he came to the conclusion that it was a valuable diamond-mine. Nothing else influenced him in entering into the contract.

Walter S. Lockhardt deposed that he had known the defendants for a number of years. He then gave details as to the formation of the syndicate, in which witness and his firm secured an interest. On two occasions, the first time at the end of last year, and the second time in January last, the defendants showed witness diamonds which, it was stated, had been found at Roodedam. It was not until the second occasion that he saw the 3½ carat stone. Witness then deposed as to his visit to the mine, when he saw a wash-up. A number of sieve-loads were put upon the sorting table, and resulted in 12½ carats weight of diamonds being found. Carter attended the machine, Armstrong superintended the sorting, and there were some twelve or fifteen boys about. He went round the mine, and Armstrong pointed out some bore-holes, which he said were twelve or fifteen feet down in yellow ground. On another occasion when witness was there he found rock in several shafts. There was nothing to indicate the presence of those shafts or holes the first time he was at the farm. It had never been reported to the syndicate that any holes had been filled up, or that there had been a blank wash. The matter of granting an option was never before the syndicate, but witness had suggested to the defendants the pooling of the syndicate shares, so that the members of the syndicate would have the opportunity of offering the same amount as any other person. In December, 1896, Carter became associated with McLelland in washing débris from De Beers lying on the London and South African Exploration Company's property. In March, 1897, McLelland died, and Carter, under an arrangement with his widow, carried on the business. From what witness saw when he went over the farm with White, it must have been perfectly obvious to experienced prospectors like the defendants that there was no mine there. Witness was interested in the purchase of Reid's share by Hampson.

The result of his visit to the Roodedam farm on April 28 was that the deposit and the diamonds, and the washings subsequently shown to him by the defendants, convinced him that the whole thing was a regular swindle.

Andries Brink, diamond valuator at Kimberley, said he was thoroughly conversant with the several kinds of diamonds. Diamonds from distinctive mines had their own especial characteristics. Shown a small parcel of stones, he could tell with absolute certainty from which mine they originated. He had never been wrong when judging in this manner. After making an inspection of the farm at Hope Town, and examining a parcel of diamonds which the defendants gave him to understand were the production of the Roodedam mine, he came to the conclusion that they were diamonds from De Beers débris, which he had previously valued in Kimberley. He had bought thousands of carats of the débris diamonds during his extensive experience, and the moment he saw the parcel in question, he found the stones to be precisely of the same character.

By Sir Henry Juta: Diamonds from the Bultfontein mines were smaller and whiter than those from De Beers, and had small triangular marks upon the surface, which never occurred in De Beers. He could not describe the especial characteristics of De Beers diamonds as compared with those of any other mine, though he could tell the difference at a glance.

Thomas Gibson McClelland, partner in the firm of McClelland & Lockhart, and a member of the syndicate formed by the defendants, stated that he paid a visit to the farm in company with Wright and Hampson, and after making a tour of inspection, Armstrong superintended some washing, while Carter took the diamonds out of the sieves, in nearly every one of which the stones were found. There were so many washed up that someone remarked at the time that diamonds were more plentiful than deposit. Lockhart subsequently mentioned that the whole thing was a "frost," when Armstrong denied that he told the plaintiff that the farm would be any particular size.

By Sir Henry Juta: Armstrong told him that he had admitted to Franklin that there would be little short of 800 claims, but witness himself made no effort to gauge the number.

By Mr. Burton: With regard to the matter of the options, there was no resolution passed by the syndicate to refuse all options. He did not remember any meetings being held at which no minutes were recorded. It was not agreed that the syndicate should give neither Mr. Smuts nor anyone else any option. He would have agreed himself to allow an option to anybody, provided they were suitable persons.

William Franklin, in Government employ, and controller of the dry mines at Barkly West, said he visited Roodedam on March 14. He did not know whether at that time the defendants had filed declarations of the mine. He witnessed some washing, and examined some bore-holes, which Armstrong told him were either all in yellow, or in indications of yellow ground. He washed five loads in company with White and several boys, and got seven carats. He believed it was a mine until the result of the Government washings were made known.

By Sir Henry Juta: He paid an official visit to the farm, accompanied by the inspector of police, the Magistrate, and other officials, and after some washings had taken place before them, he (witness) went up to the homestead and there made a speech, for which he was now sorry. He made rather a glowing speech, in which he said the mine was a very promising one, and showed very favourable indications. Witness had heard, though he did not know, that diamonds had been found on the farm years before the defendants instituted investigations. He knew it was the easiest thing in the world to salt a mine. He did not know, however, how it was done.

Re-examined: If anyone was desirous of salting five loads he would in all probability use a small bag of deposit about a foot deep. He could not say for certain, though, as he had never had occasion to salt a mine.

Daniel Stephanus Brink, diamond prospector of twenty years' experience, residing at Kimberley, stated that he was well acquainted with every mine in Kimberley. He was the original prospector of Theron's mine, and he had washed close upon 3,000 loads there. The indications were precisely the same as those of the Kimberley mines. He visited Roodedam when things were at the height of expectation on April 12, and as a result of investigations which he made he was surprised that such experienced men could have made such a mistake. Some deposit which Armstrong showed him struck him as being foreign to the ground.

By Sir Henry Juta: He would be prepared to contradict the witness Topp proposed to be called by Sir Henry Juta) if he said he had ever found diamonds without deposit.

Clarence Reginald White, residing at Barkly West, said for five years he had been a director of the Elandsdrift mine. He proceeded to relate the result of a visit which he paid to the Roodedam farm on March 22. He made several borings, but found yellow in none of them. One load would yield about a cupful of garnets and carbon. Out of twelve loads washed on the farm on April 14, twenty-five diamonds, weighing altogether 12½ carats, were found. Witness opened up several old shafts, which had evidently been filled in, and which were pointed out by the boy "Willie."

By Sir Henry Juta: There may or may not have been yellow pot clay in the borings. He could not say for certain. He declined to say how he had been living or who had supplied him with the means of life since the criminal trial.

Re-examined by Mr. Innes: He was not in receipt of a penny from anyone connected with the case.

Adam McIntosh, second-class detective at Kimberley, stated that he had been in the Diamond-fields since 1871, and his experience had been very largely connected with yellow ground. He gave evidence concerning a visit of inspection which he paid to the farm at Roodedam. A handful of deposit scattered over three or four loads would give a show at the washing. He only found one small diamond weighing a quarter of a carat in the south-east corner after washing for three or four days.

By Sir Henry Juta: He could not swear to the place from which the diamond came. He had never known a similar case to occur during the whole of his experience. It might have stuck to the machine.

Captain Quentrall, Government Inspector of Mines at Kimberley, said he went to Roodedam under instructions from the Government, and made a tour of inspection in company with White and Franklin and the defendants. With the aid of a Government drill they made several fresh holes, but only succeeded in reaching either rock or decomposed dolorite. He was satisfied after this inspection that there was no mine. He did not feel justified, however, in condemning it straight away, and recommended further investigations.

By Mr. Justice Solomon: They were all of opinion that the drill was striking rock by the sound, and to further bear this out, when shafts were sunk at No. 1 and No. 2 the rock was disclosed. It was impossible to give an opinion on the small amount of soil obtainable from a bore-hole in a pulverised state.

George Henry Alexander, manager of the Robinson Diamond-mine, also gave evidence as to examining the soil on the defendants' farm; he then came to the conclusion that there was no diamond mine. He made subsequent visits, and nothing resulted from washings on those occasions.

By Sir Henry Juta: He had always been on the most friendly terms with Carter, and they had lunched together since the criminal trial. He had only lately commenced to collect evidence.

Wm. Ed. Ayliff, Inspector of Cape Police, gave evidence as to seeing Carter place his hand in the washing-machine while in operation. Carter had his back to him, and the other Europeans were watching some sorting going on close by.

By Sir Henry Juta: The others standing by could have seen the action if they had looked, but they were too absorbed in the sorting.

Sir Henry Juta: There was much jollification afterwards at the Homestead, I believe?

Witness: Several speeches were made, and there was some dop.

Johannes du Toit, a farmer, said he was at Roodedam on April 14. While watching some washing going on he saw Carter pull his hand out of his trouser pocket, and, keeping it closed, push the soil down in the "hopper" and draw his hand out open. Several boys were close to the machine.

By Sir Henry Juta: It was the first time he had seen the washing operation, but his suspicion were at once aroused at Carter's action. He suspected that either deposit or diamonds were being introduced. He mentioned the matter to several friends, and made no secret of it.

Edward Herbert Damants, detective officer at Beaconsfield, stated that it was a well-known fact that diamonds from separate mines had their own especial characteristics. Carter held a permit to wash débris diamonds, and the parcel produced was, in witness's opinion, a picked sample.

John Gabriel du Toit, a farmer, residing at the Half-way House, between Hope Town and Roodedam, said that he drove the defendants frequently, and on one occasion while driving them in a buggy they met the boy "Willie," about three miles from Hope Town. He said he was going to Kimberley, but the defendants ordered him back, telling him that they would not let him go into Hope Town alone. He was ordered back to wait at witness's farm, and witness later in the day returned and took him into Hope Town, where he put up in the same house as the defendants, who subsequently left for Kimberley.

John van Reenen, Civil Commissioner at Hope Town, gave evidence of the following declarations made by the defendants: March

9, 87 diamonds (28½ carats); March 18, 258 diamonds (73¾ carats): April 15, 56 diamonds (28 carats): April 30, 5 diamonds (3½ carats).

Samuel Solomon gave evidence as to being present at the criminal trial on behalf of the "Advertiser," when he took a longhand report of the proceedings, which included statements made by the defendants.

This evidence having been objected to,

Mr. Justice Solomon suggested that the better course would be to cross-examine the defendants themselves upon the accuracy of their statements. The evidence offered at present would not be admitted.

Frederick Wells, débris washer, said he was employed by the Detective Department to go down to Roodedam, and superintend the washing from May till June. No diamonds or deposit were found during that time.

Professor Corstorphine produced a geological report on samples of ground which had been taken from Roodedam, and submitted to him. He declared that geologically it was not yellow ground.

Sir Henry Juta: South Africa has been rather a puzzle to geologists, as it has upset so many of your theories?

Witness: There are one or two things that are new in South Africa.

Sir H. Juta: There have been many surprises. With regard to diamonds, for instance; according to geologists, no diamonds ought to have been found in Kimberley?

I should rather put it this way. According to the experience of diamond-finders, the same conditions do not exist here.

Sir H. Juta: You would not have expected to find them?

No.

Moses Cornwall, Mayor of Kimberley and Deputy Sheriff, said he met Armstrong towards the end of October last, when he came to his office to be served with a summons in connection with the present proceedings. Armstrong voluntarily commenced a conversation, in which he expressed surprise that the summons should have been issued. For his part he said he did not desire to contest the case. He had had quite enough of Carter, and was going to have nothing more to do with him. He considered he had been deceived by Carter and had been unwittingly brought into the thing, which he had faith in at first, but something which occurred at the trial caused him to be suspicious. On one occasion Carter was sick and had to return to Kimberley. Armstrong said he accompanied him to the station in a cart, but before they started Carter jumped down, and walking across the farm remained at the washing machine for some time. Carter denied this at the trial, but Armstrong told witness that he was absolutely certain of it. Witness did not try to elicit anything at all from Armstrong, whose statement was entirely voluntary.

Willie van Nel, a Griqua boy, said he remembered being sent to Roodedam with several other boys about Christmas, 1897. They sunk a well and began washing before the end of the year, but nothing resulted from the first washing. It was his duty to feed the machine and do the sieving. At the second washing in the afternoon of the same day Carter came upon the ground and stood next to the machine. He saw Carter put his hand into his left-hand trousers pocket, and as he withdrew it saw a yellow diamond protruding a little way out of his fist. Carter then buried his hand in the hopper, and commenced to rub the soil, remarking that "it was fine ground." At the subsequent sieving several small diamonds were found. On a subsequent occasion witness saw Carter scatter something over a heap of soil taken from one of the excavations, and after he had gone away witness walked over to see what Carter had thrown down, and picked up several rubies. When Messrs. White and Franklin paid a visit to the farm, witness pointed out to them two holes which had been filled in. He swore to Carter, however, that he had not pointed out the holes, because Carter looked very red in the face and had a gun with him. He thought he might shoot him.

By Sir Henry Juta: There were three other boys at the washing machine with him. He subsequently saw two of them, Frickie and Sekwe, at the gaol, but he did not tell them to give the same evidence at the court as he did, nor did he tell them that he had had a good time in Johannesburg at Mr. Robinson's expense. On no occasion did he see Armstrong put his hand in the machine, though he saw Carter do so several times. He did not have "a jolly time" in Johannesburg. He had about as good a time there as he was having then in the court.

The Right Hon. Cecil John Rhodes, Life Governor and Chairman of De Beers, stated that the defendants came to Groot Schuur about January last and offered him both their interests in the syndicate for £750,000. The size of the mine was not mentioned, but he was satisfied that it was evidently something good, as the defendants told him the yield would be about one carat a load. After a deal of discussion witness said he would require a test before anything definite could be arrived at, for as he remarked to them at the time, "They might be very honourable gentlemen, but they might also be otherwise." It was subsequently agreed that a Mr. Williams should be sent down to institute a test, and that witness should have the refusal of defendants' interests. The defendants did not know the size of the mine. They said they had gone down an old well on the farm, and found some diamonds.

By Sir Henry Juta: He could not say for certain whether the defendants said they had gone down to clean the well. He did not remember whether they said they had found the diamonds in the "dump" around the well or in the well itself.

This closed the plaintiff's case.

For the defence,

Captain Brown, claim-holder and digger at Bultfontein, said he had been exclusively engaged in diamond-digging and prospecting for the past six years. He went out to Roodedam in March and had a general look round. To a digger the ground had the appearance of nice-looking yellow ground. Witness again visited the farm about August 31. together with Dyke and McClelland. The ground inside the enclosure differed considerably from the surrounding country. There was nothing within the fence that looked like the common bed-rock outside. They made several borings, but did not strike rock in any one.

Cross-examined by Mr. Innes: He was doubtful about the existence of a mine on the farm. He could not tell from the appearance of the yellow ground without testing it whether it was diamondiferous.

James M. Taylor said he had had twenty-seven years' experience in diamond mining, being actively engaged during the whole of that period. He made an inspection of the Roodedam farm, and drilled several bore-holes. No rock was struck in any of these, though a few boulders occurred ; but these were quite common. In his opinion there had not been a thorough test of the mine, as only a few feet in depth had been excavated. He said this despite the fact that several hundreds of loads had been washed with no good result. He had known large numbers of loads to be washed in the Bultfontein mine and nothing to result from it.

Cross-examined by Mr. Searle: He had known Armstrong for about twelve years, and was on friendly terms with him. He saw limestone, boulders, and a promising-looking yellow, but he had not tested it. The only test of yellow ground was to wash it. The pulverised soil which he took from the bore-holes was of a greasy nature to the touch.

Re-examined by Mr. Burton : This greasy feeling was characteristic of yellow ground .

Jas. M. Dyke, residing at Beaconsfield, a digger of considerable experience, stated that he inspected the farm in company with Captain Brown. One of the shafts had beautiful-looking yellow ground in it. He saw no rock in the holes, but only streaks of shale were reached. The samples of ground (produced) taken from the farm were all of a soft nature, and good yellow ground. There had not been enough practical work done on the farm to decide its capabilities.

Cross-examined by Mr. Innes : After soil was washed and a deposit was found the ground could be considered diamondiferous, but if no deposit occurred the soil would not be diamondiferous.

Arthur B. Topp, a digger and prospector, gave evidence as to visiting the farm in March and October. In shaft 31 on the plan he found a mixture of shale and lime, but in 48 and 49 yellow ground was struck. He could not say how far the yellow ground went beyond the bottom of shaft 49. In No. 38 there were a few round boulders, as big as a man's head. During his experience he had found diamonds without deposit—as a fact, about two or three thousand loads—which was something altogether new in diamond mining.

Cross-examined by Mr. Innes: The defendant showed him several diamonds at the Homestead, which he (witness) valued at about 7½ carats. They told him that it ran about one carat a load. He believed that the " bubble " had burst, and they all knew now that there was no mine, though he saw yellow ground there. Where there was no deposit one generally found "pin-head diamonds," or "just as much as to swear by."

Alexander W. McCullum, prospector at Kimberley, corroborated the evidence, to great extent, of the witnesses Dyke an Brown.

Cross-examined by Mr. Searle: He ran a club at Hope Town of which the "half-crowners" were mostly members. The club was since dead. He inaugurated the club to forward a little scheme of his own, and desired to concentrate the "half-crowners" at one spot. His little scheme was to float a syndicate, which, however, did not come off. He saw yellow ground on the farm, but did not test it.

Frickie Hendricks, native labourer at Kimberley, said he was working with Willie van Nel at Roodedam at the end of last year. He (witness) helped to fill in one hole during one morning. He did not fill in any during the evening or night-time.

Paul Johannes van Coller, an attorney practising in Hope Town, stated that he was present at an interview which Dr. Smuts had with Armstrong. He endeavoured to obtain an option over the whole farm, but Armstrong said that sufficient work had not been done on the farm to enable him to express an opinion. He would, however, submit the matter to the syndicate. The syndicate refused an option, but gave no reason. His son wrote to Mr. Robinson: the letter did not emanate from himself as well.

Thomas Duncan Eddington, secretary of the syndicate, stated that at a meeting of the syndicate the advisability of granting an option was discussed, and it was decided to allow an option to no one. Witness did not keep the minutes of that meeting, at which there were present: Messrs. Hampson, Wright, McClelland, witness, and the defendants.

Cross-examined by Mr. Innes: No minutes were kept of the meeting because it was generally understood to be "an informal gathering." Witness himself was against selling or allowing an option, as he considered they had a good thing and should hold it as long as they could.

Re-examined: No notice was sent to members of the syndicate to meet to discuss the subject of options, but he believed they were notified by word. It was resolved to pay £8,000 to the owner of the farm of 2,000 morgen. £6,000 was paid, but Lockhart entered a protest against payment of the remainder.

David Wright, sharebroker, carrying on business in Kimberley, and a member of the syndicate, stated that the syndicate was formed sometime in November, 1897, on his suggestion to Armstrong. About March 15, t a meeting of the syndicate, witness suggested that the mine should be closed down, as they had no title, and some doubt had got abroad as to the genuineness of the mine. No resolution on this point was arrived at at the meeting.

William M. Izdebski, chief detective at Beaconsfield, said he had had very great experience with regard to diamonds. He visited Roodedam in company with some members of the syndicate and made a tour of inspection. He saw 12½ carats of diamonds, but they did not strike him as débris diamonds: if they had he would have informed his department.

Cross-examined by Mr. Innes: His connection with diamonds was altogether with the criminal side, his business being to trace thefts. He would not call himself a fully competent judge of diamonds, nor would he put his opinion up against that of men like Messrs. Brink or Damant. It was quite possible that diamonds could have been put into the machine while he was there.

Alexander Armstrong, one of the defendants, said he had had sixteen or seventeen years' experience in diamond-digging, and had recently been managing director of the United Mines at Bultfontein. The circumstances which led up to the formation of the Roodedam Prospecting Syndicate were related by witness. It was decided by the syndicate that prospecting should be done on the farm, and for this purpose a machine was sent out. They commenced washing on December 16, and cleaned away the lime, which was about 3 feet deep, and then arrived at the yellow ground. Carter was ill, and left for Kimberley. Witness washed five loads while Carter was away, and found 12½ carats. The deposit found was of a nice character. At a subsequent washing, however, he did not find any diamonds. Witness left Roodedam on December 19, and put Paul Eitner in charge, and told him to drill some bore-holes. He returned on December 27 with Carter. He denied filling in any of the holes or instructing the boys to do so with yellow ground taken from the paddocks. Only flat stones were placed on the top of the bore-holes in the usual way. Carter and himself took out prospectors' licences on March 2. They washed twenty-eight or thirty loads, and obtained 28½ carats of diamonds. On March 14 three or four loads from No. 1 Paddock were washed in the presence of Franklin, and 6¼ carats taken from it. On the following day eight or ten loads were washed in the presence of some members of the syndicate, including Wright and Hampson, and on that occasion eight carats were secured. On April 2 witness met Ferguson at Hope Town, and showed him everything that was exposed on the mine. He was subsequently shown the diamonds obtained at the washings at the Homestead. Here Ferguson told witness that he wanted a controlling interest. Witness replied that neither Carter nor himself had decided upon selling any of their interests. Ferguson then said, "You hold a big interest. Why not sell me a third?" Witness consulted with Carter, and it was decided not to dispose of their interests. Witness then described the conversation which he subsequently had with Mr. Robinson, when the latter made an offer of £75,000, which, however, was increased to £85,000 before he had seen the mine. A visit was paid to Roodedam, and there Mr. Robinson was shown all the diamonds which had been extracted, amounting to 102½ carats. Witness left for Natal the same night and the further evidence on this point was similar to that given by Mr. Ferguson, who was present with Mr. Robinson.

Mr. Innes (cross-examining): Now, Mr. Armstrong, do you think that there is really a mine at Roodedam?—I say it has not been thoroughly tested.

But you understand there is £90,000 at stake and your reputation as an honourable man, and yet since the criminal trial you have taken no steps to test it farther, knowing all this?—Well, the syndicate were pulling this way and that, and then I had the summons served upon me. I was very worried at the time.

But, Mr. Armstrong, six months elapsed between the conclusion of the trial and the time when the summons in the present case was served.—I intend yet, for my own satisfaction, to spend money on the farm for further examination.

That is what you want the £90,000 for, to sink it in Roodedam I suppose?—Well, there would be no harm in that.

Continuing, witness stated that he gave Mr. Rhodes two months' option for De Beers, but denied that he told Mr. Rhodes that the syndicate would not grant an option.

Cross-examination was continued at great length.

William Carter, the other defendant, stated that he was at the present time insolvent in consequence of the criminal action. He had not made a penny out of the whole thing. He denied that he gave any instructions for any of the holes on the farm to be closed down during the night. He denied all the allegations made against him by several of the witnesses with regard to "salting."

Cross-examined by Mr. Innes: Witness had not the faintest idea who salted the mine. It was impossible for him to say whether it even was salted, though, looking back upon what had occurred it appeared very much like it. He denied that he generally superintended the washing. Eitner was usually in charge. The statement which had been made that he put yellow ground around the bore-holes was entirely an invention, as also were the allegations made by the boy "Willie," whose evidence was a complete fabrication. Three shafts were filled in because they wished to keep things quiet, and as good yellow ground was found in them, they considered that the less they were exposed the better it would "suit their purpose." He denied all mention of an option to Mr. Rhodes. If Mr. Rhodes mentioned this in his evidence then he was telling that which was untrue.

After counsel had addressed the jury and Mr. Justice Solomon had summed up the evidence, the following questions were put to the jury by the Registrar: Did the defendants, prior to and at the date of the contract, represent to the plaintiff that they had found 102½ carats of diamonds from 105 to 108 loads of ground which they had taken from paddock No. 1, and a small quantity from ground round the well and from paddock No. 2? That certain bore-holes as shown on the plan had been sunk into yellow ground, and that the said yellow ground covered an area of 800 claims? If so were these representations, material? If these representations, or one or either of them so made induced the plaintiff to enter into the contract in question? If so, were such representations false? If false, were such representations false to the knowledge of the defendants or either of them at the time they were made? If such representations were made, were they made with th object of inducing the plaintiff to enter into the contract?

To all these queries the foreman of the jury replied in the affirmative. To the sixth question, the answer was "Yes—to both o them."

Judgment was entered accordingly for the plaintiff in convention and for the defendant in reconvention.

[Plaintiff's Attorney, Gus. Trollip; Attorney for Carter's Trustee, D. Tennant; Attorneys for Armstrong, Messrs. Scanlen & Syfret.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice MAASDORP.]

SOEKER V. FERNANDEZ. { 1898. Dec. 9th.

This was an action for £50 damages sustained by reason of the defendant having so negligently driven his cart on the evening of August 1, when passing through Woodstock, as to collide with and injure the plaintiff's cart and horse.

Mr. Benjamin appeared for the plaintiff.

There was no appearance for the defendant.

After hearing the evidence,

The Court gave judgment for the plaintiff for the sum of £40 and costs.

[Plaintiff's Attorney, A. P. Kenealey.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

SWART V. SWART. { 1898. Dec. 12th.

Mr. Jones applied for a decree of civil imprisonment against the respondent. The respondent had brought an action for divorce against his wife in the Circuit Court at Swellendam, but judgment had been given against him with costs. A writ of execution had been issued against him for the costs, but a return of *nulla bona* had been made.

The Court granted a decree of civil imprisonment.

AFRICAN BANKING CORPORATION V. MULLER BUSH AND CO.

Mr. Maskew applied for the final adjudication of the defendants' estate.

Granted.

GARLICK AND OTHERS V. JACOB JACOBSON.

Mr. Gardiner applied for the final adjudication of the defendant's estate.

Granted.

ILLIQUID ROLL.

GELB V. GRAAFF.

Mr. Buchanan applied, under Rule 329D, for judgment for the sum of £1,000, being the balance of the purchase price of certain property purchased on October 18, 1898, for the sum of £1 100. Interest was also asked on the said sum of £1,000 from November 1, 1898, with costs of suit, the plaintiff tendering transfer of the property on payment being made.

Granted.

VAN BLERCK V. HAYWARD.

Mr. Buchanan applied, under Rule 329D, for judgment for the sum of £56, the purchase price of property sold by the plaintiff to the defendant.

Granted.

VICKERS V. ISMAIL ALLY.

Mr. Buchanan applied, under Rule 329D, for judgment for £900, being the balance of the purchase price of certain property purchased by the defendant from the plaintiff on September 28, 1898, for £1,100. Plaintiff also asked for costs of suit, and interest on the unpaid balance at the rate of 6 per cent. from October 1, 1898. Transfer of the property was tendered.

Granted.

BLUMENTHAL AND CO. V. BELFOUR.

Mr. Buchanan moved for judgment in terms of a consent paper for £34, balance of rent due.

Granted.

ADMISSIONS.

Mr. Buchanan moved for the admission of Gerald Morton Martin as an attorney and notary of the Supreme Court.

The order was granted, and leave granted for the oaths to be taken before the Resident Magistrate of Steynsburg.

Mr. Buchanan moved for the admission of Rudolph A. van H. Tulleken as an attorney and notary of the Supreme Court.

The order was granted, and leave given for the oaths to be taken before the Resident Magistrate of Graaff-Reinet.

Mr. Gardiner moved for the admission of John F. E. Bernard as a conveyancer.

The order was granted, and the oath administered.

REHABILITATIONS.

Mr. Buchanan applied for the rehabilitation of the insolvent estates of Jacobus Arnoldus Bester, Charles James Leppan, Anthony Michael Ferreira, Solomon Lewin, and Andries Auret.

The orders were granted in each case.

GENERAL MOTIONS.

IN THE MATTER OF THE PETITION OF MAT. MAVUYA.

Mr. Benjamin moved that the rule *nisi*, granted under the Derelict Lands Act, be made absolute.

Granted.

IN THE MATTER OF THE PETITION OF PERCIVAL FREDERICK STRATFORD.

Mr. McGregor moved for an order authorising the Registrar of Deeds at King William's Town to register the transfer of certain property.

The Court granted the order as prayed, but the Chief Justice pointed out that in cases such as this the Registrar of Deeds should be asked to frame a report. In the present instance there were some pencil memorandums, but that was hardly a report.

IN THE ESTATE OF THE LATE MARTHINUS WILHELMUS THEUNISSEN AND ELIZABETH FREDERICKA THEUNISSEN.

Mr. Benjamin moved on behalf of the tutor dative of certain minors interested in the estate for an order authorising the sale of certain landed property.

The Master, in his report, recommended that the tutor dative be authorised to sell the property by public aution and pay the debts, the balance to be paid into the Guardians' Fund, and the Master to be authorised to pay such sums as might be found necessary from time to time during the minority of the children.

It appeared that the petitioner, who was the tutor dative of the minor children, had first wished to mortgage the farm in question, and when the present lease expired, to farm the ground himself for the benefit of the children. The Master's report was not favourable to that course being followed The property was valued at between £4,000 and £5,000, and the rent received from it was £238 per annum.

De Villiers, C.J., after hearing counse said that he thought the property ought not to be sold, because if that were done there would be nothing left for the minors. As to the principle of a tutor entering into occupation of the property, the Court could not encourage that.

The Court granted leave to raise an additional sum of £507 on mortgage, and if necessary pay off the present mortgage and pass a fresh bond consolidating the amounts.

GLUSING V. THE COLONIAL GOVERNMENT.

Mr. Sheil appeared on behalf of the defendant in the action, and moved for leave to sign judgment against the plaintiff for not proceeding with the action.

Granted.

Ex parte HOLT AND HOLT, LIMITED. { 1898. Dec. 12th.

Company — Foreign registration — Registration in the Colony— Mistake.

Where a company registered with limited liability in the South African Republic was subsequently, through mistake, registered in the Colony under Act 25 of 1892.

The Court, *on the application of the Company and on being satisfied that creditors would not be prejudiced, ordered the removal of the name of the Company from the Register of Companies in this Colony.*

This was an application to have the name of the above company taken off the register of companies in this colony registered with limited liability.

The petition was as follows:

1. Your petitioners are a company registered with limited liability in the South African Republic, as will be seen on reference to the articles of association, and to the certificate of the Registrar of Companies of the South African Republic hereunto annexed.

2. Your petitioners, in error and under a misapprehension of the state of the law, went through the form of registering, or purporting to register, a company under the style of Holt and Holt (Limited) with the Registrar of Deeds of the Colony under the provisions of Act No. 25 of 1892.

3. The circumstances under which the said registration was effected are fully set forth in the affidavit of Albert Holt, a managing director of your petitioning company, which is filed in support hereof.

4. The firm of Holt & Holt (Limited), was registered with limited liability on the 15th April, 1897. The memorandum of association was registered in the Deeds Office in Cape Town on the 4th of June, 1897, and the articles of association were registered on the 19th of June, 1897.

5. The objects of the company, as set forth in the memorandum and articles of association registered in Cape Town, are precisely the same as those of the company previously registered in Johannesburg. The assets of the late firm of Holt & Holt had been taken over by the company registered in Pretoria, who were carrying on the business in pursuance of their articles, and for this reason, if for no other registration in the Colony was ineffectual, inasmuch as there were no assets to be taken over by the Colonial Company, these having already been acquired by the company at Pretoria.

6. The articles of association filed at Pretoria were signed by twenty-five persons and of these seven signed the Memorandum and Articles of Association filed with the Registrar in Cape Town, these signatures being

D. Holt	holding	42,598	shares
W. van Holsteyn		100	„
H. L. L. Feltham		1	share
H. D. Rainier		1	„
A. J. Prinsloo		1	„
J. Hayward		1	„
Fred. H. Rose			

The memorandum and articles here are not signed by any person who was not a signatory to the articles filed at Pretoria.

7. Your petitioners find themselves hampered and embarrassed in the manner set forth in the affidavit of the said Alfred Holt. They are advised and believe that it was not necessary, and was indeed illegal, for their company to have been registered in the Colony as aforesaid, inasmuch as they were already a company duly formed and existing and registered with limited liability in another State.

Wherefore your petitioners pray that the name of the company styled Holt & Holt (Limited) may be removed from the Register of Companies in Cape Town, and that the certificate of registration may be declared null and void, or otherwise that your petitioners may have such other and further relief as may seem meet.

Mr. McGregor appeared for the applicants.

After hearing counsel,

De Villiers, C.J., said that the Court would grant a rule *nisi*, with the understanding that the matter would be fully argued again upon the return day, when precedents would be looked for. It would also have to be ascertained whether there were any creditors of the company in the Colony, and also as to whether any fines had accrued to the Government. The Court would, therefore, grant a rule calling upon all concerned to show cause by January 12 why the name of the company should not be removed from the register; the rule to be published once in the "Government Gazette," twice in two Cape Town newspapers, and twice in a Johannesburg newspaper, and to be returnable on January 12, 1899.

Postea (January 12th, 1899).

Mr. McGregor moved that the rule be made absolute.

I can find nothing in Act 25 of 1892 which gives the Court power to make this order. The English Companies Act of 1862, section 18, says that "a certificate of the incorporation of any company given by the Registrar shall be conclusive evidence that all the requisitions of this Act in respect of registration have been complied with." The important point is that the registration here was ineffectual because it was illegal. There are two leading cases upon the question of the illegality of registration of a foreign company: *Bulkeley* v. *Schutz* (L.R., 3 P.C., pp. 764, 769); *Bateman* v. *Service* (6 App. Ca., p. 386); *Chadwyck Healey on Company Law* (p. 9).

[De Villiers, C.J.: Is there any case where a Court in England has granted an order for the removal of a company's name from the register independently of winding up?]

I cannot find any. *Princess of Reuss* v *Boss* (L.R., 5 H.L.P., p. 176) is most against the applicants' contention, but that was not a case of a company registered in a foreign country. In the Orange Free State there was the case of *The Treasurer-General* v. *Newjaarsfontein D.M. Co.* (C.L.J. 10, p. 255). The question is whether there is any prejudice to shareholders or creditors. There are no shareholders under the Colonial registration, and the liability to creditors would be very slight.

De Villiers, C.J., said: It is quite clear that a mistake was made in registering this company here at all. Supposing that on the same day after the mistake was made an application had been made to the Court to rectify the mistake, I do not think any objection would have been raised. In the present case, however, some interval has elapsed since the registration, and during that interval creditors might possibly be prejudiced by the name of the company being removed from the register. In order to prevent any such prejudice the Court ordered ample notice to be given of this application. No objection has now been raised by anyone concerned. I find also that this matter has been before the Registrar of Deeds, and he can find no objection to this course. On the whole, therefore, we are of opinion that this rule should be made absolute.

SOLOMON V. WOLFF. 1898.
Re VICTOR WOLFF, N.O. V. SOLOMON. Dec. 12th.

Costs — Partnership — Liquidating partner.

The Court, *having sustained with costs the exception* lis alibi pendens *to a claim advanced by a liquidating partner against his co-partner, subsequently granted leave to issue a writ against the plaintiff personally for the costs of the judgment.*

See Wolff v. Solomon (8 Sheil, 340).

This was an application by Solomon, the defendant in an action recently brought against him for leave to issue a writ against Victor Wolff personally for the costs of the judgment granted in defendant's favour. Victor Wolff had brought the action in his capacity as liquidator of Wolff & Co.; the defendant had excepted to the declaration on the ground that the same action was pending in the Transvaal High Court, and the exception was upheld with costs. It was now sought to recover the costs from Wolff individually on the ground that he was a partner, and the only partner in the firm.

Mr. McGregor appeared for the applicant.

Mr. Close for the respondent.

After argument, the application was granted.

De Villiers, C.J., said: The action was really brought by one partner against another; the fact that Wolff called himself liquidating partner does not really affect the point. If he had succeeded he would have become entitled to the property, and as he has not he must pay the costs. The only question of doubt was whether there should be a postponement, but I do not think there is sufficient reason for any postponement.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorney, Gus. Trollip.]

BOON V. BOON.

This was an application for a decree of divorce, the defendant having failed to comply with the order of Court and restore to the plaintiff her conjugal rights.

Mr. Molteno appeared for the plaintiff.

A decree of divorce was granted.

IN THE MATTER OF THE FREE STATE PROSPECTING SYNDICATE, IN LIQUIDATION.

Mr. Close presented the second and final report of the liquidators.

The usual order as to publication was made.

ABRAHAMS V. ABRAHAMS.

Mr. Buchanan moved for leave to sue by edictal citation for restitution of conjugal rights, failing which a decree of divorce.

A rule *nisi* was granted, returnable February 1, personal service to be effected if possible, failing which one publication to be made in a Natal newspaper, one publication in a Transvaal English newspaper, and one in a Transvaal Dutch newspaper.

VAN ZYL V. GREEFF.

Mr. Benjamin applied for an interdict restraining the respondent from parting with certain moneys pending the result of an action instituted by the applicant.

No order was made, as it did not appear from the petition that the petitioner was without security.

IN THE INSOLVENT ESTATE OF JACOBUS ALBERTUS LOUW.

Mr. Buchanan moved for an order authorising the Master to take the necessary steps for the appointment of a new trustee.

Granted.

IN THE MATTER OF THE COLESBERG COLLEGIATE SCHOOL ASSOCIATION.

Mr. Benjamin moved for an order placing the said association in liquidation.

The order was granted, and a liquidator appointed with power under section 149 of the Companies Act of 1892. The question of security to stand over.

Postea (13th December).

Security to the satisfaction of the Resident Magistrate of Colesberg was ordered to be given.

IN THE ESTATE OF THE LATE DAVID HUME.

Mr. Benjamin moved for the cancellation of a certain bond, the original of which could not be found. Declarations had been tendered to the Registrar of Deeds in order to have the bond cancelled under the regulations, but one of the declarations had not been legalised in accordance with Regulation 49 inasmuch as the seal of the notary had not been certified by a proper Government officer.

Granted.

PHILIP BROS. V. THE CAPE COLLIERIES, LIMITED.

This was an application for a rule *nisi* for the suspension of a writ of execution to be made absolute.

Mr. Graham, Q.C., appeared for the applicant.

An order was made in terms of a consent paper put in.

IN THE ESTATE OF THE LUNATIC DANIEL ROELOF JACOBS.

Mr. McGregor moved for an order authorising the Master to pay over to the curator the amount standing to the credit of the lunatic, who was resident in the Transvaal. and had been declared by the High Court of that State to be of unsound mind.

Mr. McGregor referred to *Re Van der Linden* (L.R., 1 Ch.D. 1897, p 453).

The Court granted an order authorising the Master to pay out of the capital belonging to the lunatic the taxed costs of the application in the High Court of the South African Republic and the taxed costs of the present application, and then to pay the interest on the balance to the petitioner during the lifetime of the said lunatic.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice MAASDORP.]

DYKMAN V. DYKMAN. { 1898. Dec. 13th.

This was an action for a decree of judicial separation brought by the plaintiff against her husband, and a cross-action for divorce on the ground of adultery. The parties resided at Cape Town, and were married on October 3, 1882. There were two children alive of the marriage, a son and a daughter. The declaration alleged that the defendant repeatedly struck the plaintiff, and charged her with drunkenness and misconduct. The plea admitted that on divers occasions the defendant had charged the plaintiff with intemperate habits, but said that such charges were true. The defendant also admitted striking the plaintiff on two or three occasions, but the blows were not of great violence. and there had been great provocation. He admitted charging her with misconduct, and alleged that she had committed adultery with one Manuel Gotthelf. He further alleged that the plaintiff had left her home without reasonable cause. Defendant claimed in reconvention a decree of divorce, the custody of the minor children of the marriage, the forfeiture of all benefits under the marriage in community of property, and costs of the suit.

Mr. Benjamin appeared for the plaintiff.

Mr. Close appeared for the defendant.

Christina Ellen Dykman, the plaintiff, stated that she was married on August 2, 1882, to the defendant. There had been three children of the marriage, two of whom were still alive. The eldest survivor was a boy of fifteen years old, and the youngest a daughter eleven years of age. Six months after marriage defendant went insane for a time, and slapped her on the face. Eight years ago the first cruelty took place, when defendant gave her a slap in the face, but he commenced to systematically ill-treat her eighteen months ago, Last September when they were living at Bramwell's Cottages, he assaulted her cruelly, and accused her of having committed adultery. Mrs. Davis was present when defendant struck witness. Her husband had certain delusions regarding charms, and believed that witness wore charms. Witness had at times taken a glass or two of wine, and it might have gone to her head, but she never got drunk. Witness denied that she ever committed adultery. Witness had been left £1,893 in property and money. Of that property there was only one house, which had been bought for £375. now left, and that one was in defendant's name. The daughter was now in a boarding-school, and she required alimony.

Cross-examined: The daughter had not been put in a boarding-school on account of witness neglecting her and treating her badly. It was not on account of witness's drunken habits that defendant became insane shortly after their marriage. Witness had never been drunk, nor had she ever been free with men. Defendant had slapped witness in the face and had given her a black eye. Witness was hasty tempered, and when he would tell her to hold her mouth she would not do so, but would have the last word. They had moved about from place to place, but that was on account of defendant's health, and had nothing to do with witness's conduct.

Magdalena B. Arenz deposed that she had known Mrs. Dykman for four and a half years, living near to her, and had never seen her drunk. The children, when witness saw them, were always clean, and seemed attached to the mother. On one occasion plaintiff had shown witness marks which she said had been caused by her husband striking her.

Wilhelmina Knipe stated that she had known plaintiff for thirteen or fourteen years, and had seen her frequently, but had never seen her drunk. The children seemed attached to the plaintiff.

Georgina Connor said she had known plaintiff for some years, and had never seen her drunk. Defendant had told witness that he wanted to get a divorce.

Cross-examined: Witness had never drunk with plaintiff.

Ada Groom said that she had known plaintiff since the birth of her first child, and had seen her frequently since then, but had never seen her drunk. The children seemed attached to the mother.

Cross-examined: Witness had seen plaintiff taking a glass of wine, but not more.

For the defence,

Hendrick Johannes Dykman, the defendant, stated that he carried on business as a tinsmith and coppersmith. It was untrue that he had treated his wife cruelly. He had struck her on three occasions, when she had given him great provocation. Once he went home and found her drunk. He had often accused plaintiff of being too familiar with men. Witness detailed incidents which led him to suspect her fidelity. She had gone to the Great Northern and to a house kept for an ill-purpose in Gore-street.

Cross-examined: Plaintiff had kissed men in witness's presence, and said there was no harm in doing so.

Dora Davis, plaintiff's stepsister, stated that she had lived with the Dykmans from the time she was four years old until she was fifteen years old. When defendant was at the Convalescent Home plaintiff was frequently drunk, and witness had to lead her upstairs to her room. Defendant had always been kind to plaintiff.

Cross-examined: Witness did not like plaintiff because she had never treated her as a sister.

Charles Edward Dykman, a brother of the defendant, said that the defendant had always treated the plaintiff fairly and well. It was nothing uncommon to see plaintiff the worse for liquor. He had on one occasion seen her lying drunk.

Emanuel Gotthelf, a plumber, stated that he knew the parties to the suit. He first became acquainted with them six years ago, and often went to see them. Sometimes defendant would be out, and witness would drink with the plaintiff. At other times plaintiff would come to witness's place. At that time witness was not married. Witness had committed adultery with plaintiff about two and a half years ago.

Mrs. Brown stated that her husband was a tailor, and Gotthelf had an account with him. One Saturday evening her husband sent her to Gotthelf's to collect some money. Witness went into the room and found

Gotthelf and Mrs. Dykman sitting on a sofa. Both were very excited. Witness lived opposite the Dykmans. The children were not well looked after, and witness had seen Mrs. Dykman the worse for drink.

After hearing Mr. Benjamin,

De Villiers, C.J.: The plaintiff in this case brings an action for judicial separation on the ground of the defendant's cruelty. Well, there is evidence that the defendant has on two or three occasions struck his wife, but there is considerable conflict as to the nature of the assault. I do not think it is quite as bad as the plaintiff wishes the Court to believe, and I think that the defendant had considerable provocation, because, although the plaintiff seeks to smooth over her conduct, I am satisfied that she was continually the worse of liquor. The evidence leaves no doubt in the mind of the Court as to that. Under these circumstances, if there were no claim in reconvention, I do not think the plaintiff would succeed in obtaining a decree of separation. But it is unnecessary to decide upon the claim in convention should the defendant succeed in his claim in reconvention by proving adultery, because in that case the Court would grant a decree of divorce, and there will be no necessity for considering the question of a separation. I may say that if the plaintiff had been a sober woman at all times, then the Court would not perhaps have been satisfied with the evidence as to adultery given in this case, but seeing that she was a woman who often took more liquor than was good for her, and that she also took drink with the man Gotthelf, the Court has come to the conclusion that the evidence as to her adultery with Gotthelf was correct. If the case depended entirely upon the admission of Gotthelf, no doubt the Court would be loth to accept it unless strongly corroborated by independent testimony. The manner in which Gotthelf gave his evidence showed that he did not give it willingly; that it had been in some way extracted from him. His evidence as to the adultery was corroborated by the evidence of Mrs. Brown, who stated that she came across the plaintiff and Gotthelf sitting together in a private room under suspicious circumstances. Now the plaintiff denies that she was there at all. If she had admitted she was there the circumstance would not have been so very suspicious, but she denies she was there at all, and that leads one to the conclusion that she was there for an improper purpose, else why should she deny it? It is said that Mrs. Brown might be mistaken, but I should think from the plaintiff's appearance that she is not a person who could be easily mistaken. Mrs. Brown was perfectly satisfied that the plaintiff was the person who was in the room, and I think Mrs. Brown gave her evidence in a very clear manner, and I am inclined to give full effect to what she stated. Her evidence corroborates Gotthelf's statement as to the adultery, while the plaintiff denies that she was in the room at all. The Court can therefore come to no other conclusion than that she was there for an improper purpose, and the defendant is entitled to a decree of divorce and the custody of the minor children, although the plaintiff will have access to them at all reasonable times and places. There is the further claim for forfeiture of all benefits in community of marriage; but as the property really seems to belong to the plaintiff, and the defendant seems to have spent a good portion of it, the Court is of opinion that the property should be equally divided, and the best plan will be to appoint a receiver. Mr. Currey, of the General Estate and Orphan Chamber will therefore be appointed receiver to divide the property between the defendant and the plaintiff after the payment of all debts in the estate; the costs of the present suit to come out of the joint estate. On the claim in convention there must be judgment for the defendant.

Maasdorp, J., concurred.

[Plaintiff's Attorneys, Messrs. W. E. Moore & Son; Defendant's Attorney, A. P. Kenealey.]

SUPREME COURT

[Before the Right Hon. Sir J. H. de Villiers, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice Solomon.]

KOCH V. HENDRICKSE. { 1898. Dec. 14th. „ 16th.

This was an application for a rule *nisi* restraining respondent from trespassing on applicant's property, and polluting his water, to be made absolute. The parties were neighbours living on the Cape Flats.

The respondent in his affidavit did not justify his trespass, but alleged that he had taken water on the applicant's property for the last four and a half years without objection on the part of former proprietors; that he had no knowledge that he was infringing the applicant's rights until the 14th November last, and since then had not trespassed nor intended to trespas. Replying affidavits on behalf of the applicant alleged that respondent had caused frequent annoyance to one at least of the former proprietors and to the applicant. An affidavit of Mr. Poppe stated that since the 14th November the respondent had in his hearing asserted a right to use the water, and had broken down a fence erected by the applicant.

Mr. Jones appeared for the applicant.

Mr. Benjamin for the respondent.

After argument, the matter was allowed to stand over to enable the respondent to file a reply to Mr. Poppe's affidavit.

Postea (December 16th).

Affidavits denying both the assertion referred to and the act of trespass were now put in.

After argument,

De Villiers, C.J., said: In the present case there was very material correspondence withheld from the judge to whom the application for a rule *nisi* was made. I do not say it was intentionally withheld, but there is the fact that it was withheld. There was the letter of the applicant to the respondent on the 17th November, and the respondent's reply to it. The clear inference from this reply is that the respondent does not intend to trespass upon the property in the future. To this answer there was no reply sent by the applicant. This correspondence was brought into this Court when the application to have the rule *nisi* made absolute was made, and then only was there a statement made in the replying affidavit of the applicant to the effect that since this letter was written there had been an assertion of rights by the respondent. Strictly speaking that affidavit should not have been admitted. It was an entirely new matter, but having been admitted an opportunity was given the respondent to answer this statement, and this resulted in respondent denying it. Under all the circumstances, as the case stands now, the rule *nisi* must be discharged with costs. It is still competent for the applicant to bring his action for damages in the past if he wishes, but that does not interfere with the question of the interdict, which is only granted where there is reasonable ground for fearing injury in the future.

[Applicant's Attorney, D. Tennant; Respondent's Attorney, A. P. Kenealey.]

HARRIS V. COHEN.

This was an application for a rule *nisi* restraining respondent from transferring certain property to be made absolute.

In the affidavits it was alleged that the applicant, George Harris, on November 10, concluded negotiations with the respondent, Conrad Cohen, for the purchase of certain houses, the purchase price to be payable in instalments of £7 monthly, with interest, and a broker's note was passed by Messrs. Steer & Co. Before respondent received the broker's note he left for Port Elizabeth, and did not return until November 21. On November 11 one Morris went to Messrs. Steer & Co. and offered £80) cash for these houses, and requested that offer to be telegraphed to the respondent at Port Elizabeth. That was done, and respondent wired back instructions for that offer to be accepted. On respondent's return, on November 21, he found the broker's note of the sale to Harris at his house, and he repudiated it.

Respondent declared that he never recognised the present applicant as the purchaser of the two houses, and he was not aware of any contract whereby he was bound to give applicant transfer.

Mr. Buchanan for the applicant.

Mr. Benjamin for the respondent.

The rule *nisi* had been granted upon the broker's note, but as the applicant relied now upon negotiations between the applicant and the respondent, the Court ordered the matter to stand over until the respondent should have had time to file an answering affidavit.

Postea (December 16th).

The respondent filed an answering affidavit denying that he had verbally concluded a sale of the property to the applicant.

After argument,

De Villiers, C.J., said: An application was made to a judge in Chambers for an interdict restraining the transfer of this property, and the evidence submitted to the judge was a broker's note, which on the face of it seemed all right. It bore the statement that there had been bought on account of George Harris from Cohen certain two houses upon certain terms. This was signed by Steer & Co., and the learned judge of course took it that this represented a true contract between the parties, and granted this rule *nisi* restraining the transfer of the property to any other purchaser. But on the application to have the rule made absolute it was stated on behalf of the respondent that this broker's note was executed upon certain conditions, that it was upon the representations of the applicant himself that the broker's note was executed. During the respondent's absence in Port Elizabeth the applicant came to Steer & Co., and on the strength of his representations as to certain negotiations which had passed between Cohen and himself, Mr. Steer drew up the broker's note. In his affidavit Mr. Steer says that he told the applicant that it was given subject to the respondent's confirmation of the statements made by applicant. When the application for the rule *nisi* was made, the applicant relied upon the broker's note, but on the application for that rule to be made absolute he relied upon the previous negotiations, and the Court therefore gave the respondent time to file an answering affidavit to those statements. In that affidavit the respondent denies that there was any such contract. To say the least of it, it is extremely doubtful now whether there was any contract. The broker's note is not sufficient evidence of the contract, and the respondent denies that there was any oral contract. Now the Court has repeatedly stated that it would require the clearest proof of any sale of land by verbal contract, and that is not forthcoming in the present case. As I have said, it is extremely doubtful whether there was any sale at all. Under these circumstances it would be quite unusual for the Court now to grant an interdict. If the applicant has any remedy after transfer has been passed the only remedy would be by way of damages. The Court can only now discharge the order with costs.

[Applicant's Attorney, D. Tennant; Respondent's Attorney, A. P. Kenealey.]

GOLDMAN V. GOLDMAN.

Mr. Buchanan applied for an extension of the return day in this case.

The Court granted an extension of the return day until January 12.

WATSON V. WATSON.

This was an application on notice served upon the respondent, Thomas Hunter Watson, calling upon him to show cause, if any, why the applicant, Frances Wilhelmina Watson, should not be allowed to sue him *in forma pauperis* in an action for divorce or for a judicial separation, and why he should not be ordered to advance to her £30 for the purpose of bringing such action.

The petition set forth that there were two children of the marriage. The said respondent was in the employ of the Colonial Government and received £144 per annum, and in addition to that earned money by photography. It was alleged that since the marriage the respondent had treated the applicant with great cruelty, and on more than one occasion beat her so severely as to necessitate medical attendance. On March 21, 1898, the parties entered into an agreement to separate. At that time there was an inheritance of about £130 due to the applicant, and she had since found that she could not touch that without the assistance of her husband, which assistance had been refused. It was further alleged that the applicant, from further information she had received, was convinced that the respondent had been guilty of adultery. The applicant wished also to sue for the custody of the children, alleging that they were badly treated by the respondent, in whose custody they now were. She also alleged that she did not have reasonable access to them. In an answering affidavit, respondent admitted the marriage and said that during the whole of their married life unhappy and continual differences had arisen between them. He admitted that he had under great provocation raised his hand against applicant, but that had been fully condoned by her. He had only his salary of £12 per month, and as he was only learning photography, he made nothing out of that. He had great difficulty in paying his way, although he had board for himself and children at a cheap rate from applicant's father, for owing to the applicant's extravagant habits while she was still living with him, heavy debts had been contracted, which he was still paying off. Respondent denied that any ill-treatment on his part had led to the separation, and he also denied ever having refused the applicant reasonable access to the children. He also alleged that the applicant had never shown any affection for the children, and he desired to retain custody of them.

In her replying affidavit, the applicant denied that she had got the respondent into debt through her extravagant habits, and said that when she separated from him the only debts owing were to the baker and the doctor, and were for 12s. and 15s. respectively.

Mr. Buchanan appeared for the applicant.

Mr. Benjamin for the respondent.

De Villiers, C.J., suggested that the parties should agree to a judicial separation, the applicant to have the custody of the youngest child of the marriage, the said child being two years old, and the respondent to have the custody of the eldest child, which was three years old, and that the £130 be equally divided between the parties.

Counsel for the respondent said his client could not agree to that, and would rather have all the evidence led.

De Villiers, C.J., said : I am sorry that the parties can not come to some agreement, and under the circumstances the Court will have to order the whole of the £130 to be received and paid into the hands of the Registrar of the Supreme Court. Out of that sum £30 must be paid over to the applicant for the costs of the action she is about to institute for a judicial separation. The respondent will also be ordered to assist the applicant in obtaining that money.

[Applicant's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Respondent's Attorney, C. C. Silberbauer.]

PRIESTLY V. DUMEYER. { 1898. Dec. 14th. „ 19th.

Negligence—Contributory negligence—Intervening act of third party—Effective cause of damage—Master and servant—Scope of employment.

In an action for damages caused by the negligence of a cabdriver in running over the plaintiff, it was found that the plaintiff had been guilty of some negligence, but that the driver could with ordinary care have avoided the accident.

Held, *that, as there was an immediate connection between the driver's negligence and the damage, the plaintiff was not debarred by his own negligence, which in a remoter degree contributed to the accident, from recovering for the damage.*

The accident took place while the cab was being actually driven by a person who had taken the cab at the stand as an ordinary passenger, but had afterwards been allowed by the driver, who was the defendant's servant, to drive the horse, while the driver occupied a seat inside.

Held, *that the negligence of the driver in handing the reins to an incompetent person was the effective cause of the accident, and that the defendant was liable.*

The accident having taken place during a time when, and at a place where the servant was employed on his master's business,

Held, *that the fact of no charge having been made to the passenger did not relieve the master from liability.*

This was an appeal from a decision of the Resident Magistrate, Cape Town, in an action in which Catherine Dumeyer, the respondent, sued the appellant Priestly for the sum of £20 damages sustained by her through her being run over by a cab belonging to the appellant. The evidence showed that the respondent (plaintiff in the Court below) was crossing Sir Lowry-road when she was knocked down and injured by a cab belonging to the defendant (the appellant). The driver of the cab was the defendant's son, but at the time of the accident he had entrusted the driving of the cab to one Meyer, and was riding inside the cab himself.

The defendant's son in his evidence said that Meyer was a friend of his, and came to him on the stand, and asked him to drive him to his house, and he did so. Meyer was then driven to Buitenkant-street, and then asked to be allowed to drive in order to try the horse; the driver then got inside, and Meyer got on to the driver's seat and drove to Newmarket-street on his own business. Witness said he took Meyer to his house as a friendly act, and did not charge him anything. His father knew nothing about it.

The Magistrate gave judgment for the amount claimed. The following were his reasons : The defendant is a cab proprietor, and owner of cab No. 28. The defendant's son. Hendrick Priestly, was the driver of this cab. On the 21st May, 1898, the cab 28 was plying for hire, and was engaged by one Meyer, who was first driven to his house and then to a house in Buitenkant-street, where it was arranged that the cab should call for him in the afternoon. The cab, in due course, returned to this house, and left it at 7 50, with Meyer as driver, with Hendrick Priestly's consent, the latter taking the inside seat. About eight o'clock the plaintiff, with a child in her arms, was walking on the side-walk of Sir Lowry's-street. It was her intention to cross the street to Wicht-street, and as soon as a tramcar passed her she started to cross the street. Before leaving the side-walk she saw the cab following the car, but in her opinion it was sufficiently far off to enable her to pass or cross the street safely in front of the cab, and started to walk across the street with her back to the cab, and did not again look back to the cab. She then heard a shout, and next moment she was knocked down. I found on facts that the man Meyer was intoxicated, and was driving at a very fast rate and recklessly; that the driver of the cab was in a position to see plaintiff, that he had ample time to pull up or otherwise avoid the accident, and that the accident was occasioned by the negligence of the driver. The defence, contributory negligence, was not set up nor was such a defence relied upon, but it was discussed, and I was of opinion that had the plaintiff looked back she would have seen the cab and avoided the accident, but she could be seen all the way by the driver. The defendant's son, who was inside the cab, saw the plaintiff's danger and called out to her, but she did not hear him. It is therefore clear that the driver must have seen the plaintiff, and he could with ordinary care and precaution have avoided the accident. The street was clear and there was therefore ample room for the cab, and the driver was not justified under the circumstances in driving recklessly on to the plaintiff. There was some negligence on the part of the plaintiff, but not of such a nature as to excuse the act of the defendant's driver. The defence really was that the man Meyer was not the servant of the defendant and that therefore the defendant was not liable; but Meyer was an ordinary fare, whether he was charged or not, and in allowing him to take the driver's seat, the defendant's driver did not in law give up the control of the cab, which was at the time plying for hire within the municipality in the ordinary way. The amount claimed did not appear to me to be excessive, and the full amount was therefore awarded.

The defendant appealed.

Mr. Ward appeared for the appellant.

There was no appearance for the respondent.

Mr. Ward: The appeal is based upon three grounds. First, there was such negligence on the part of the respondent as would disentitle her to recover damages. *Wolff* v. *Beard* (8 C. and P., p. 373): *Hawkins* v. *Cooper* (8 C. and P., p. 473); *Williams* v. *Richards* (3 C. and K., p. 81). Secondly, the person who was driving and actually caused the accident was not the servant of the defendant. The decided cases clearly show that a master is only responsible for acts done by his employé by reason of the nature of the employment, or on account of an implied authority. *Gwilliam* v. *Twist* (2 Q.B.D. 1895, p. 84).

[Solomon, J.: Was not the driver negligent in allowing another man to drive?]

Yes, but the permission was not within the scope of his authority. He was not acting in the interests of his employés. He was out on a lark of his own. As to the necessity of the driver being the servant of the owner of the vehicle, *Milligan* v. *Wedge* (12 A. and E., p. 737); *Joel* v. *Jamison* (6 C. and P., p. 501). Where the act is an illegal act there can be no implied authority from the master to do that act. Thirdly, no matter by whom the damage was done the defendant is not liable because the vehicle was not being used in his service. In that respect the Roman-Dutch law is at one with English law. *Giffard* v. *Table Bay Harbour Board* (1874, p. 114). English decided cases lay down that where a servant has gone out on his master's authority and has then gone off on an expedition of his own the master is not liable for damage done by him. *Croft* v. *Alison* (4 B. and A., p. 590); *Joel* v. *Morison* (6 C. and P., p. 501); *Limpus* v. *General Omnibus Co.* (32 L.J. Ex., p. 34); *Ward* v. *General Omnibus Co.* (42 L.J.C.P., p. 265). If a servant is acting in the real or supposed interests of his master, even if directly contrary to his instructions, the master is liable; if not so acting the master is not liable. As to what acts are within the scope of the servant's authority: *MacKenzie* v. *McLeod* (10 Bing., p. 385); *Williams* v. *Jones* (3 H. and C., p. 256); *Stevens* v. *Woodward* (6 Q.B.D., p. 318); *Mitchell* v. *Craswaller* (13 C.B., p. 207);

Rayner v. *Mitchell* (2 C.P.D., p. 357); *Storey* v. *Ashton* (L.R., 4 Q.B., p. 476); *Stowe* v. *Hills* (29 Am. Rep., p. 635).

Postea (December 19th).

De Villiers, C.J. (after reading the Magistrate's reasons): Mr. Ward, in his able argument, based his appeal against the judgment on three grounds, namely, that there was contributory negligence on the part of the plaintiff, that the cab was being driven by Meyer and not by the defendant's servant, and that the servant was not, at the time of the accident, acting within the scope of his employment. As to the first ground, the Magistrate certainly found that there was some negligence on the part of the plaintiff, but the immediate cause of the accident was the driver's making no attempt whatever to avoid mischief which might easily have been avoided. "Damage which a person sustains through his own fault," says *Pomponius* (Dig. 50, 17, 203) "is not deemed in law to be damage at all." *Grueber* in his work on the *Aquilian Law* (p. 228) says: "The reason for admitting culpa-compensation is certainly that the causal connection between act and damage is interrupted by the culpa of the injured party." In the present case there may have been negligence on the plaintiff's part in crossing the street and not looking back when she knew that a cab was coming on, but she might reasonably have believed that the cab would not come on at a reckless speed. The driver of the cab, on the other hand, saw the plaintiff, knew that she did not hear the shout from the cab, and yet drove on at full speed and knocked her down. With ordinary care he might have avoided the mischief. How then can it be said that the causal connection between his negligent act and the damage was interrupted by the contributory negligence on the part of the plaintiff? The immediate cause of the damage was the absence of any attempt on the part of the driver to avoid an avoidable accident and, therefore, even if the plaintiff was guilty of negligence which more remotely contributed to the accident, she is not in my opinion deprived of her remedy. This view is quite consistent with the later English decisions which recognise the right of a plaintiff to damages, although he may have been guilty of contributory negligence if the defendant could with ordinary care have avoided the mischief.

The second ground of appeal is that the driver of the cab at the time of the accident was not the defendant's servant. But it was the defendant's servant who, by his negligence in handing the reins over to an incompetent driver, was the effective cause of the accident. For this negligence the defendant, in my opinion, is liable. An instructive case was recently decided by the Court of Appeal in England which in some respects is very similar to the present case. The defendant in that case had employed a man to drive a cart, with instructions not to leave it, and a lad, who had nothing to do with the driving, to go in the cart and deliver parcels to the customers of the defendant. The driver left the cart in which the lad was, and went into a house. While the driver was absent the lad drove the cart some little way for the purpose of turning it, and in so doing came into collision with the plaintiff's carriage. In an action to recover for the damage caused by the collision it was held that the negligence of the driver in so leaving the cart was the effective cause of the damage, and that the defendant was liable. In the present case the defendant's servant was in the vehicle when the accident took place, and had not parted with the control over the cab and horse, and there exists therefore the greater reason for holding that his negligence was the effective cause of the damage.

At first sight there would seem to be some force in the third ground of appeal that at the time of the accident the defendant's servant was acting outside the scope of his authority but, after full consideration, I am of opinion that this ground also fails. The accident took place at a time when and at a place where the servant was employed on his master's business. As between them, the servant may have been guilty of a breach of duty in conveying a passenger from place to place without charge, just as there would have been a breach of duty if he had given credit to a passenger instead of demanding payment in cash. I confess to some difficulty in following those English cases in which the slightest deviation from the master's instructions has been held to relieve him from liability. Where the rights of third persons are concerned I would consider the general scope of the servant's employment without regard to any detailed instructions which he may have received from his master. If, in the present case, the driver, contrary to the defendant's instructions, had given credit to Meyer instead of demanding cash payment, there would have been no doubt as to the defendant's liability for the servant's negligence. The driver was acting at the time within the general scope of his employment in driving a passenger from place to place in Cape Town, and the plaintiff is not, in my opinion, deprived of her right to relief by the fact that no charge was made to the passenger.

The appeal must therefore be dismissed.

Solomon, J., concurred.

[Appellant's Attorneys, Messrs. Scanlen & Syfret].

[Before the Hon. Mr. Justice **MAASDORP** and a **JURY**.]

STIGLINGH V. RHODES. { 1898. Dec. 14th.

This was an action for £2,000 damages for slander.

The declaration (paragraphs 1 and 2) alleged that plaintiff and defendant were Parliamentary candidates for Barkly West, and that on a certain day before the polling, at the Diggers' Hall, a meeting of electors was held, at which (paragraph 3) defendant made a speech, in which the following statements were made by the defendant:

"I would say frankly that I have given money to be spent on these elections. But then we begin to think of the other side (the defendant meaning thereby the political party to which the plaintiff belonged), and finding that they too have been spending large sums of money, we wonder where it has come from. We know that neither the leaders of the other party (the defendant meaning thereby the political party to which the plaintiff belonged) nor their followers are men who would spend thousands on elections, and so we cannot but wonder where the money is coming from. Without being in the least libellous, we remember that the President of the neighbouring State (the defendant meaning thereby the President of the South African Republic) has said that he has to spend large sums on secret service in the Cape Colony, and so it seems very natural to suppose that the money has been spent on the elections in this country. We can take no better case than that of the man who is opposing myself (the defendant meaning thereby the plaintiff). We know that he (meaning the plaintiff) has come straight from Pretoria (meaning thereby the capital of the South African Republic.) We know that he only comes like the swallow at a certain time of the year; that he has come for the election, and that when the election is over he will take wing back again to Pretoria, and in the meantime he will live in Kruger's (meaning thereby the President of the South African Republic) pocket. Well, then, we have the plain fact that in our constituency a man (meaning the plaintiff) has been despatched from the Transvaal (meaning the South African Republic) to fight our election with moneys provided out of the Transvaal revenue. Was there ever a greater perversion of capital than the action of the party to which Mr. Schreiner belongs (the defendant meaning thereby the political party to which the plaintiff belonged) in using money from a foreign State (meaning the South African Republic), a State that is very unfriendly to her Majesty, for the purpose of fighting an election in the Cape Colony."

4. By the said words the defendant intended to convey, and did mean and was understood to mean, that the plaintiff was an emissary and creature of and employed and paid by the South African Republic, its President and Government, with a view to promote and aid the plaintiff in his election as a member of the House of Assembly of this colony, in order that he might, as such member, further the interests of the said State as against those of Her Majesty the Queen, and that thereby the plaintiff was in fact, and was acting as a disloyal subject of Her Majesty, and that as such, and as such emissary and creature employed by the said State, the plaintiff was promoting his election by dishonourable means, and was not a fit and proper person to be elected as a member of the said House.

5. By reason of the said false, malicious, and defamatory words, the plaintiff has been injured in his good fame and reputation, and was prejudiced and injured in his said candidature, and has suffered loss and damage to the extent of £2,000.

The defendant in his plea admitted the allegations contained in paragraphs 1 and 2. He also admitted that at the time and place, and under the circumstances referred to in paragraph 3 of the declaration, the words complained of and contained in the said paragraph, or words of similar purport, were used. He denied the other allegations in the said paragraph, but did not deny that the words used by him were actionable, and admitted that he meant to convey that the plaintiff was supplied with money by the South African Republic with a view to promoting his election, and that the plaintiff was not a fit and proper person to be elected as a member of the House of Assembly. These words were, however, spoken by him *bona fide* and without express malice. Save as above he denied the allegations in paragraphs 4 and 5. He submitted himself to the Court in regard to any damages which the plaintiff might prove he had sustained.

Sir Henry Juta (with whom was Mr. McGregor) appeared for the plaintiff.

Mr. Innes. Q.C. (with whom were Messrs. Sampson. Q.C., and Graham, Q.C.), for the defendant.

Hermanus Dempers Stiglingh, the plaintiff, stated that he was born in the Colony, and was resident at Beaconsfield. He was a J.P. for Kimberley. and by occupation a speculator. Together with the defendant he was a candidate for the House of Assembly during the last election. The words complained of appeared in an issue of the "Cape Times" and in the "Kimberley Advertiser" (produced). The election was held under the Ballot Act. It was hard for him to say what effect the words referred to had upon the election, though undoubtedly they had much effect on his business. Much personal annoyance had been caused by them, and he estimated that he had suffered material damage. He maintained that he had lost at least £1,000 to £1,500 materially, and about £1,000 in business. The whole amount of his damages he estimated at quite £2,000.

Cross-examined : The speech in which the words occurred was delivered at Klipdam on a Saturday, and the first paper to publish the speech was issued on the following Monday. The words, therefore, could only have effect on those present. The polling-places in that district were Holpan and Klipdam, where 252 votes were secured. They would not have put him in, as he was 600 behind the next man. People seemed to fight shy of him in ordinary speculation. His office was in Johannesburg, but he did not have one in the Colony, and a protest was lodged against his candidature on this ground. He could not produce his books, which were in Johannesburg, and he did not care to say what his income was at the present time. His general impression was that he was not so well off, but "he could not say from where or how." He denied ever saying any hard things about Mr. Rhodes. He remembered the meeting at Spitzkop, when he addressed a large gathering, but he emphatically denied that he said "they must stick together to keep out the murderer." Nor did he say "that if Rhodes got into power there would be war with the Transvaal."

Re-examined : He had previously contested the same constituency, though unsuccessfully, the number of votes recorded being 65 and 600 respectively.

This concluded the evidence for the plaintiff.

For the defendant,

John G. Croghan, a member of Mr. Rhodes's committee, said he was present at the meeting held in Klipdam, which was attended by local people only, notification having been given by word of mouth, and not by advertising. He was prepared to swear that there were not five men present from any other district. The speech was first printed and circulated in the "Advertiser" at Kimberley, after the election was over. At Holpan ninety-two votes were recorded, and at Klipdam 160.

Cross-examined : Klipdam was the last public place in which Mr. Rhodes addressed the constituents. There were several unregistered voters present, but they were chiefly lads under twenty years of age. The speech was "taken" by Mr. Green, of the "Advertiser," who took it into Kimberley the following day.

Henry W. Featherstonehaugh, manager of the New Jagersfontein mine, stated that he remembered a meeting held by Mr. Stiglingh at Spitzkop, on June 23. He (witness) understood Dutch perfectly. He could tell the jury exactly what occurred on that occasion.

[SirHenry Juta objected to evidence on this point.

The evidence was allowed on the understanding that it would be proved that it was brought to the defendant's knowledge that the plaintiff had abused him at this meeting, and that this with other circumstances tended to provoke him.]

Witness (continuing) said the actual words used by the plaintiff were that "they must stand together to keep the murderer Rhodes out of Parliament, for, as they knew very well, that if he got into power war with the Transvaal would come about in a very short time, and what would become of the Afrikander party ? " Witness got disgusted and left, and told several of his friends.

Cross-examined : Witness spoke Dutch fluently, and was one of the "little congregation." He remembered the words because he considered they were important. He left the meeting about half an hour after the words were spoken. He was very disgusted.

Nathaniel Brown gave evidence as to receiving information as to the words delivered by the plaintiff concerning the defendant at the meeting at Spitzkop. He told Mr. Rhodes of the matter before the meeting at Klipdam.

Cross-examined: He did not get the information from Mr. Featherstonehaugh, but from Mr. Rawson, whom he despatched to Spitzkop.

The Right Hon. Cecil J. Rhodes, the defendant, said he had no personal prejudice against the plaintiff. He admitted the words recorded as spoken at Klipdam. He had heard that the plaintiff had stated that "the election would not cost him a sixpence."

Cross-examined: He had no ill-feeling against the plaintiff, and the words spoken on each side were the usual political abuse. It did naturally influence his speech when he heard that the plaintiff had termed him "a murderer." With reference to a speech which he made at Klipdam on August 1, he did make mention of support from the Transvaal. He was referring to the boastings of President Kruger, who had himself stated that he was spending money in the Cape Colony in secret service. He was sure the Bond had not any money.

Counsel having addressed the jury,

His Lordship summed up at considerable length, informing the jury that they would have to consider whether the defendant was entitled to hold a *bona fide* belief that the words were true, and whether the circumstances under which they were said mitigated to any extent the slander which had been admitted. He dwelt on the various meanings of the words used, and concluded by informing them on the question of the assessment of damages.

The jury then retired, and returning some ten minutes later gave their verdict in favour of the plaintiff, assessing the damages at £5. Judgment was entered accordingly.

[Plaintiff's Attorney, V. A. van der Byl; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and the Hon. Mr. Justice MAASDORP.]

FLETCHER V. WHITE. { 1898. Dec. 15th.

This was an application for the confirmation of a provisional order of sequestration granted by Mr. Justice Maasdorp on November 16 last.

Mr. Benjamin appeared for the petitioner.

Mr. Molteno appeared to oppose on behalf of J. A. Foster.

In his petition the petitioner, William Fletcher, said that he had been a partner with the respondent, Albert Stanhope White, in the business of Stanhope White & Co. In August, 1898, the partnership was dissolved, and petitioner appointed liquidating partner. The balance-sheet framed showed that the said A. S. White was indebted to the said business in the sum of £5,968, being an amount overdrawn on private account, &c. He had admitted that, and also his inability to meet that serious deficiency. White had a contingency in the proceeds of a certain furniture sale.

Mr. Molteno, on behalf of J. A. Foster, read an affidavit made by the latter, in which he said he had, on behalf of White, accepted a draft for £500 on the Standard Bank, due November 15, receiving as security certain movable property and the transfer deeds of certain immovable property, including some property belonging to Mrs. White, which he was to sell, and then to deduct from the amount realised the said £500, with interest at bank's rate. Deponent advertised the property for sale, but before the sale Fletcher and White called upon him, and Fletcher wanted him to give up the transfer deeds of Mrs. White's property. Deponent refused to do so, and mentioned the arrangement by which he received those deeds as security for the acceptance of the draft, but said that if Fletcher gave an assurance to make no claim upon the landed property of the said White in his (deponent's) hands, he would give up the deeds of Mrs. White's property. Fletcher gave that assurance, and the deeds being given up to him, he had the property transferred into his own name. It was alleged that Fletcher, having now got the benefit of that property, sought to have White's estate sequestrated, to the detriment of Foster, who held it as security

An affidavit by White was put in corroborating Foster's statments as to Fletcher giving the assurance mentioned.

In his answering affidavit Fletcher distinctly denied having given any such assurance. It was also explained that the proceeds of Mrs. White's property were applied to the liquidation of a debt due by her to the firm.

After hearing counsel,

De Villiers, C.J., said: If the statements of Foster, corroborated as they are by White, are true, and Foster has really given up the security he had in Mrs. White's property, it would be impossible and unjust to grant sequestration. Fletcher has now got the benefit of Mrs. White's property, and before the Court can grant an order of sequestration Foster will have to have his position with regard to the security restored.

The case was allowed to stand over in order that the petitioner might be communicated with as to some arrangement for restoring the security to Foster.

Subsequently, no arrangement having been arrived at, the provisional order was superseded, and the application dismissed with costs.

[Applicant's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

DE FOURD V. THE TOWN COUNCIL OF CAPE TOWN.

1898. Dec. 15th.

Municipal regulations—*Ultra vires*—Brothel—Nuisance—Police.

The Cape Town Council, being authorised by Statute to make regulations for the purpose amongst others of "prohibiting brothels," framed a regulation imposing a penalty on "any person who keeps or manages or assists in the management of a brothel."

Held, on appeal against a conviction for keeping a brothel, *that the regulation was not* ultra vires.

This was an appeal from the conviction of the appellant by the Resident Magistrate of Cape Town on a charge of contravening section 224 of the Cape Town Municipal Regulations, framed under the provisions of Act 26 of 1893, and promulgated by Government Notice 170 of February 21, 1898, in that on or about October 8, 1898, the said De Fourd did wrongfully and unlawfully keep, manage, or assist in the management of a brothel.

The accused pleaded not guilty, but after evidence had been led, she was found guilty, and fined £5. Against that decision the present appeal was instituted.

Regulation 224 was in the following terms: The keeping of brothels is hereby prohibited, and any person who keeps, or manages, or acts, or assists in the management of a brothel, or being the tenant, lessee, or occupier of any premises, knowingly permits such premises or any part thereof to be used as a brothel, or for the purposes of prostitution, or being the lessor or landlord of any premises, or the agent of such lessor or landlord, lets the same or any part thereof, with the knowledge that such premises or some part thereof, are, or is, to be used as a brothel, or is wilfully a party to the continued used of such premises or any part thereof as a brothel shall, on summary conviction, be liable to a penalty not exceeding £15 sterling, or, in default of payment to imprisonment for any term not exceeding two months, with or without hard labour, and such tenant or occupier may be forthwith ejected by the lessor or landlord of such premises, or the agent of such lessor or landlord, from the premises so occupied; and on a second or subsequent conviction, to a penalty not exceeding £20 sterling, or, in default of payment, to imprisonment to any term not exceeding three months, with or without hard labour.

Mr. Benjamin for the appellant: Regulation 224 is borrowed in part from 48 and 49 Vict., c. 69. *Garrett on Nuisances* (p. 225). It must be read in the light of the common law. No new offence is created by Act 26 of 1893, section 170, sub-sec. 8: that Act merely gives the Council power to "make, alter revoke or amend rules and regulations for prohibiting brothels, &c.": "brothel" must mean such brothels only as are indictable at the common law. The decisions under the English Statute are very wide, and do not apply only to such as are disorderly; but in England a brothel is illegal at common law even if not a nuisance.

[De Villiers, C.J.: As the Act gives the municipality power to prohibit brothels, have we not simply to inquire "What is a brothel?"]

Power cannot be given to a municipality to create an offence by regulation. As to what brothels are indictable at the Common Law, see *Regina* v. *Paulse and Abrahams* (2 Sheil, p. 306), where it was held that the keeping of a brothel in such a manner as to be a public nuisance was indictable. As to the construction of penal clauses, *Maxwell on the Interpretation of Statutes* (pp. 367, 368); *Lumley on Bye-laws* (p. 87). Brothels were recognised in Holland. *Van Leeuwen's Commentaries* (4, 37, 11). This brothel was not a public nuisance.

Mr. McGregor for the respondents: "Brothel" is defined in the *Imperial Dictionary* as a "house appropriated to the purposes of prostitution," in *Wharton's Law Lexicon* as "the habitation of prostitutes." *Stephen's Digest of Criminal Law* (Art. 180): *Regina* v. *Rice and Wilton* (1 C.C.R., p. 21); *Singleton* v. *Ellison* (1 Q.B.D., 1895, p. 607, per Wills, J.)

[De Villiers, C.J.: Under what law or authority can a policeman enter a woman's room?]

I cannot give any information on that point. The facts clearly show that the house was a brothel.

Mr. Benjamin in reply: English Statute law expressly makes the keeping of a brothel a criminal offence, but our law does not.

De Villiers, C.J.: The Town Council is authorised by the 170th section of its Act to make regulations for the following among other purposes (8) "prohibiting brothels." The only question to be determined on this appeal is whether the term "brothel" applies only to such places as are a public nuisance, or whether it is wide enough to include houses which are frequented for the purposes of prostitution even although they are conducted in an orderly manner. I am clearly of opinion that the Legislature intended to use the term in the latter sense. It is not for the Court to inquire whether it is possible for the Legislature to succeed in stamping out prostitution. Under our common law, differing in this respect from the English law, the keeping of a brothel is not an indictable offence unless it is conducted so as to be a nuisance to others. But the Legislature having authorised the Council to make regulations for prohibiting brothels, the Council was acting within the scope of its authority when it framed the regulation now in question, by which a penalty is imposed on any person who keeps, manages, or assists in the management of a brothel. The appellant certainly did keep a brothel, and was therefore rightly convicted. I cannot refrain from saying a word as to the conduct of the police, in entering the private bedrooms of the women in the house, for the purpose of ascertaining whether they were carrying on the trade, if I may so call it, of prostitution. Even these abandoned women have their rights, and without their permission or a legal warrant, no policeman is justified in interfering with their privacy. It appears that the appellant and the other women in the house are registered under the Contagious Diseases Act, 1885, and have to attend the Lock Hospital periodically for inspection. I should have been inclined to attach much weight to this recognition of the legality of their trade, but for the 45th section of the Act, which provides that the Act shall not have the effect of legalising prostitution. The appeal will be dismissed, but, under the circumstances, there will be no order as to costs.

[Appellant's Attorneys, Messrs. Innes & Hutton; Respondents' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

LAMBRECHTS V. VAN DER BYL.

1898.
Dec. 15th.
„ 16th.

Magistrate's jurisdiction—Arbitrator—Novation—Delegation.

In an action in a Magistrate's Court for £150, being the price of goods sold and delivered, no objection was taken to the jurisdiction, and judgment was given for the plaintiff for the full amount. On appeal *the objection was taken, but the plaintiff, being willing to accept £100 in lieu of the amount originally claimed,* the Court, *being satisfied as to the sale,* ordered judgment to be entered for £100.

This was an appeal from a judgment of the Resident Magistrate of Stellenbosch in an action in which the present respondent sued the appellant for the sum of £150 19s. 1d., being the balance of the purchase price of certain sheep and a cow. The defence raised was that the defendant had not purchased the stock in his own name, but as agent for one Kooseboom, and that the plaintiff knew this. The Magistrate gave judgment for the amount claimed. In giving his reasons, he stated, *inter alia*: "The jurisdiction of the Magistrate in this case having in no way been challenged, it was assumed that the parties consented to the question at issue between them being submitted to the decision of the Resident Magistrate in preference to seeking the more expensive process of the higher Court. The Magistrate found that the defendant Lambrechts, on the 12th April, 1898, purchased the sheep and cow in question from the plaintiff in his own name and not in the capacity of an agent for any declared principal . . ."

The defendant appealed.

Mr. Benjamin for the appellant. The Magistrate exceeded his jurisdiction inasmuch as the amount sued for was over £100. *Riversdale Divisional Council* v. *Pienaar* (J. 3, p. 252).

[De Villiers, C.J.: That case is often relied upon as laying down more than it was intended to lay down.]

The rest of the argument was upon the facts.

Mr. McGregor, for the respondent, referred upon the question of jurisdiction to *Ockland* v. *Key* (*supra*, p. 356).

[De Villiers, C.J.: In that case the objection was taken by the person who brought the action, and it was said that he was practically estopped.]

The appeal was ordered to stand over.

Postea (December 16th).

Mr. McGregor, in answer to the Court, said he was willing to accept judgment for £100 with costs.

Mr. Benjamin was further heard in argument upon the merits of the case. Lambrechts acted for Rooseboom, and not in his own name. There is a conflict of evidence, but the facts consequent to the sale show that Van der Byl must have known that Lambrechts was only an agent.

De Villiers, C.J.: Two objections have been taken on appeal to the judgment. The first is that the Magistrate had no jurisdiction to entertain a claim for the price of goods exceeding £100. This objection was not taken in the Court below. The evidence was taken, and the Court decided against the defendant, and now for the first time on appeal he takes the objection that he could not be sued in the lower Court for £150. The Court has more than once decided that the parties cannot by agreement extend the Magistrate's jurisdiction over any subject matter not included by statute within his jurisdiction, but that they may refer a dispute to him as arbitrator. A proceeding before him as arbitrator would be *extra cursum curiae* and would not admit of appeal to a higher Court. In the present case there is not sufficient proof of a reference to arbitration. If, therefore, the plaintiff had not expressed his consent to a reduction of the amount of the judgment to £100, the proper course would have been for this Court to allow the exception, *nunc pro tunc*, of want of jurisdiction, so as to enable the plaintiff to bring his action in a higher Court. The plaintiff, however, is willing to accept £100 rather than bring a fresh action in a higher Court for £150, and the only question remaining to be determined is whether the second objection to the judgment is sound. The objection is that the sheep had been sold to one Rooseboom, and not the defendant. The plaintiff is positive that he sold the sheep to the defendant, and that Rooseboom's name was not mentioned at all, and the defendant is equally positive that he was acting as the agent of Rooseboom to the knowledge of the plaintiff. The Magistrate found—and there is ample evidence to support the finding—that the defendant himself bought the sheep. It appears, however, that after the sale the plaintiff was quite willing to take Rooseboom's promissory note in payment of the price. The promissory note was not paid in full, but in part only. The plaintiff seeks to recover the balance from the defendant. What happened after the sale does not disentitle the plaintiff to recover such balance. He clearly did not intend to discharge the defendant and accept Rooseboom as debtor in his place and consequently the original debt was not extinguished by *delegation*. The defence is that the defendant never became debtor at all, and that Rooseboom was intended from the first to be the debtor, but this defence having failed, there must be judgment for the plaintiff with costs. The amount will, however, be reduced to £100, which was the limit of the Magistrate's jurisdiction.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Findlay & Tait.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

LAWTON V. WISEMAN.

{ 1898.
{ Dec. 16th.

Messenger of the Court—Negligence—Damages.

The messenger of a Magistrate's Court having negligently failed to realise certain securities lodged with him in satisfaction of a judgment, and the judgment creditor having sustained damages in consequence, judgment was given against the messenger for the amount of the damages proved.

This was an action for damages, brought by Sarah Ann Lawton against John Wiseman. The claim was for £20 damages, alleged to have been sustained by the plaintiff through the negligence of the defendant, who is the messenger of the Magistrate's Court, Barkly West. On January 14 last the plaintiff obtained provisional judgment in the Resident Magistrate's Court, Cape Town, against George de Pass. The present defendant had to proceed with a writ of execution against De Pass, but made a declaration that sufficient security had been lodged with him to satisfy the judgment. He had failed to realise that security, and through his negligence the plaintiff alleged that she had sustained the damages claimed.

Mr. Currey appeared for the plaintiff. There was no appearance for the defendant.

The following evidence was led:

Cecil Bennet Rose-Innes, clerk in the Court of the Resident Magistrate, Cape Town, produced the records of that Court in the case of Lawton v. De Pass.

Sarah Ann Lawton, the plaintiff, deposed that she was a widow, at present residing in Cape Town. Towards the end of last year she came out from England as a servant with Mr. George de Pass. She landed in this country early in the month of January in this year. Mr. De Pass had told her on the boat that she could go back to England if she paid her own passage. When they reached Cape Town, Mr. De Pass asked her if she was going up-country. She said she would not go if certain other girls also went there. He brought her before the Resident Magistrate, but did not proceed with his action. When witness went for her boxes, she found that De Pass had taken them to Barkly West. Those boxes contained clothing which she had brought from England sufficient to last her for three years. The boxes and their contents were worth more than £20. On January 14 last, she proceeded against Mr. De Pass in the Resident Magistrate's Court, Cape Town, and obtained judgment for £10 and costs. She had not received anything in respect of that judgment. She had not been paid anything.

The Court gave judgment for the plaintiff with costs.

[Plaintiff's Attorney, Gus. Trollip.]

REGINA V. NEL.

{ 1898.
{ Dec. 16th.

Theft—Evidence sufficient to convict.

This was an appeal from a sentence passed upon the appellant by the Acting Resident Magistrate of Stockenstrom. The appellant and one Mathys de Klerk were charged with the crime of theft in that upon or about the 8th day of November, 1898, and at or near Balfour, in the district of Stockenstrom, the said prisoners did both and each or one or other of them wrongfully and unlawfully steal fifty bundles of forage valued at 10s., the property or in the lawful possession of George Parry Davies, a farmer residing at Balfour. On the prisoners being arraigned, Nel pleaded not guilty and De Klerk guilty.

For the prosecution, evidence was led showing that the forage was traced to Nel's store, where it was found and identified. For the defence De Klerk was called, and stated that he alone stole the forage and brought it to Nel's store.

Nel's wife deposed that her husband did not leave the house on the evening of the theft, and that at De Klerk's request she gave him the key of the forage store after sunset on the evening of the theft, telling him to return the key in the morning. She further stated that the key was found in the drawer the next morning. De Klerk, in cross-examination, stated that he returned the key to Nel the same night, Mrs. Nel being present in the room at the time.

Both the prisoners were found guilty, and sentenced to fourteen days' imprisonment, with hard labour.

From this sentence Nel now appealed.

The Magistrate's reasons for finding the prisoner Nel guilty were that the stolen forage was found in his store, and both prisoners having been drinking together that day, he concluded they must have both been connected with the theft of the forage. Further, the prisoner De Klerk would not be so disinterested as to risk his liberty for Nel. The Magistrate also pointed out the discrepancies between the evidence of De Klerk and Mrs. Nel.

Mr. Benjamin was heard in support of the appeal.

Mr. Sheil, Q.C., for the Crown.

After argument,

De Villiers, C.J., said : This recently-stolen forage was traced into the possession of Nel, and it therefore lay upon him to give a satisfactory explanation as to how it came into his possession. To give this evidence he calls his own wife—a recent Act having legalised the evidence of a wife as well as of a prisoner himself—and he also calls the prisoner De Klerk. One does not lay much stress upon the absence of the prisoner's own evidence in a case like this, but if he calls his own wife one must think there must be some reason why he did not give his own evidence in support of that. Now the evidence of Mrs. Nel is in some respects quite inconsistent with the evidence of De Klerk. She tries to show that her husband went to bed before this theft could have been committed, and that there could be no connection between her husband and De Klerk in the matter. But when De Klerk is called he says that he got the key from Nel himself, while Mrs. Nel says that he got the key from her. Then De Klerk says that on his return he gave the key back to Nel, but that does not agree with the evidence of Mrs. Nel that her husband was already in bed. Seeing that there were those discrepancies in the evidence the explanation of Nel can by no means be called satisfactory. When the Court bears in mind that De Klerk had no necessity to steal that forage for himself, and that he used it not for his own horse but for Nel's, I cannot but think that the Magistrate was right in holding that Nel knew about the theft. Therefore the appeal must be dismissed.

[Appellant's Attorney, C. C. Silberbauer.]

REYERSBACH V. RODGER'S EXECUTOR.

1898.
Dec. 16th.

Magistrate's Court—Re-opening case—Act 20 of 1856, Schedule B., Rule 29.

The defendant in an action in the Court of the Resident Magistrate of Cape Town was not present on the day of trial, and judgment was given against him by default. An application to re-open the case, on the ground that the defendant's absence was caused by the fact that he kept a shop at Green Point, and had no one to leave in charge of it, having been refused by the Magistrate,

The Court *refused to interfere with the decision.*

This was an appeal from a decision of the Resident Magistrate of Cape Town in an action in which the appellant was sued for £10 rent. The suit was set down for hearing in the Magistrate's Court on the 4th October, but, being an opposed case, was postponed to the 5th. On the 5th October the defendant was not present, and the Magistrate was asked to grant a further postponement, as it was impossible for him to be there on that day; the Magistrate refused this, and gave judgment for the plaintiff without the defendant being heard. The defendant subsequently took out a summons under Act 20 of 1856, Schedule B, Rule 29, calling on the plaintiff to show cause why the judgment should not be reversed; that section provided, *inter alia*, that if it appears to the Court that the defendant "having been duly summoned was by just and reasonable cause prevented from attending the Court . . . then the Court shall order the judgment to be opened, and shall permit the defendant to answer the complaint or demand, upon the terms, nevertheless, of payment of the costs incurred by his default. . . ." At the hearing of this application he alleged on oath that he only received notice at nine o'clock on the morning of the 5th October that the case would be heard that day. He had at once wired back that it was impossible for him to attend that day. He lived at Green Point, and kept a shop there; he had no assistant at the time, and his wife was unable to look after the shop. Consequently there was no one to attend to it, and he thought that the case would be postponed.

The Magistrate refused to re-open the case.

The defendant appealed.

Sir H. Juta, Q.C., for the appellant: The true policy of the Court is not to allow judgment to be given against a defendant who has appeared and shows that he intends to defend the action. The fact that he is bound to pay the costs of the day is sufficient to prevent his causing unnecessary delay. The plaintiff could not have been prejudiced by a postponement.

Mr. Benjamin, for the respondent, was not called upon.

De Villiers, C.J., said: I am not prepared to interfere with the decision of the Magistrate. It is not a question of facts but a question whether there was a just and reasonable cause for not appearing in the Magistrant's Court. The cause which the appellant alleged was that he lived at Green Point and that his shop assistant was not there, and there was no one to look after the shop. In my opinion that was not sufficient excuse. Green Point is within easy distance of Cape Town, and if this excuse were allowed in this case the Court would have to take the same excuse from every shopkeeper. He ought to have got his wife to keep the shop or closed it. This is a matter in which the Magistrate's decision should not be interfered with. I quite agree with the reasons of the Magistrate. No just and reasonable cause has been shown, and under these circumstances the appeal should be dismissed with costs.

[Appellant's Attorney, C. C. Silberbauer; Respondent's Attorney, G. J. O Reilly]

MOSS V. SHIPLEY.

1898.
Dec. 16th.

Practice—Summons—Joint-debtors.

S. was sued in a Magistrate's Court for one-third of an amount, the whole of which was stated by the account annexed to the summons to have been advanced to him and two others, jointly as well as severally. An exception to the summons on the ground that the action was improperly brought and should have been against the three parties for the full amount, Overruled on appeal, reversing the decision of the Magistrate.

This was an appeal from a decision of the Resident Magistrate of Cape Town.

The appellant sued the respondent for £20 on the following account, annexed to the summons: To one-third share of cash lent and advanced to yourself, Arthur W. Sharp, and Wm. Edwards, jointly as well as severally, one-third of £94 0s. 10d., £31 6s. 11d.; to amount abandoned to bring claim within Magistrate's jurisdiction, £11 6s. 11d.: leaving a balance of £20.

The respondent excepted to the summons on the ground that the action was improperly brought, inasmuch as the account showed that the claim was a partnership debt, for which three parties were jointly and severally liable, and that the action, if any, should be against the three parties for the full amount, and that the defendant was prejudiced in his defence and unable to plead.

The Magistrate allowed the exception, and dismissed the case with costs.

The plaintiff appealed.

Sir H. Juta, for the appellant: There is no evidence that the debt was a partnership debt.

Mr. Benjamin, for the respondent: The summons alleges that the appellant and the other debtors were bound jointly and severally: in any case they must be sued together whether the liability is joint or several. *Pienaar* v. *Rattray* (12 S.C.R., p. 35) as to several liability; as to joint liability, *Dicey on Parties to an Action* (Rule 39); *Wilson, Sons & Co.* v. *Balcarres Brook Steamship Co.* (1 Q.B.D., 1893, p. 422). Lord Esher's judgment (p. 426).

[De Villiers, C.J.: Is not that a case where one party was sued for the whole amount?]

He could not under any circumstances be sued for the whole amount where he is only jointly liable.

Sir H. Juta: *Auret* v. *Pienaar* (3 Juta. p. 40).

[De Villiers, C.J.: Even in England the plea in abatement must allege that the other debtors are within the jurisdiction. Here there is no proof that they are so.]

The appeal was allowed.

De Villiers, C.J. said: An exception was taken to the summons that the action was improperly brought inasmuch as the claim was a partnership debt for which three partners were liable, and that the action should be against the three partners for the full amount. But there is nothing in the account to show that it was a partnership debt, the amount due is said to be £94 10s. jointly and severally. The defendant is sued for one-third of that. Then in order to bring the matter within the jurisdiction of the Magistrate's Court the plaintiff abandons £11 6s. 11d. The debt is a several as well as a joint one, and the question is whether the defendant can be sued for his share of the joint debt. *Auret's Trustee* v. *Pienaar* (3 Juta, p. 40) is conclusive. I am not prepared to decide now what the judgment would have been if there had been a claim for the whole amount. Seeing that the defendant is sued only for his share, and is not prejudiced, the appeal must be allowed with costs.

[Appellant's Attorney, C. C. Silberbauer; Respondent's Attorneys, Messrs. Innes & Hutton.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice SOLOMON.]

SONNENBERG v. HAARHOFF AND FINCHAM. 1898. Dec. 19th.

Election petition—Withdrawal—Notice.

An election petition cannot be withdrawn without the leave of the Court, even where the respondent has resigned his seat.

This was an application by the petitioner for the withdrawal of the election petition, and that the expenses of the petitioner, as a proposed witness, be allowed. The respondents had resigned their seats since the presentation of the petition.

Mr. Searle, Q.C. (with whom was Mr. Molteno), appeared for the petitioner; Mr. Graham, Q.C., appeared for the respondents.

Mr. Searle: Act 9 of 1883, section 22, requires that the leave of the Court shall be obtained. Section 43 provides for costs being taxed in the ordinary way.

[De Villiers, C.J.: Are there any allegations in the petition of the knowledge of the respondents of corrupt practices?]

There is a general statement in the petition that corrupt practices were carried on either by the respondents or by other persons acting in their behalf. The schedule, however, states that these corrupt practices were merely performed by their agents.

Mr. Graham: There is no prayer in the petition for the benefit of corruption by agents. The application to the Court is unnecessary. The petitioner has come down here early, not to give evidence, but to instruct his attorney. No order should be made as to the costs of the application on 1st November.

Mr. Searle in reply.

De Villiers, C.J.: I am clearly of opinion that the election petition could not have been withdrawn without the leave of the Court. The fact that the respondents have resigned does not dispense with the leave of the Court. I think that in the present case, if there had been a clear allegation in the petition of knowledge on the part of the respondents of bribery committed by their agents, the Court would not have allowed the petition to be withdrawn without giving ample opportunity to other voters in the district to go on with the petition in case the present petitioner refused to go on with it, but seeing that there is no such clear statement in the petition of knowledge on the part of the respondents I do not think it is necessary to order that notice. The only question therefore is whether sufficient notice has been given. Notice has been given to the respondent, and I think that is sufficient to satisfy the 27th section. The Court therefore will grant leave for the withdrawal of the petition. As to costs, Mr. Graham admits that the respondents must pay the costs, but he objects to paying the expenses of the petitioner himself. Well, we have the statement of his counsel that the petitioner was a necessary witness, and I think that his costs ought to be allowed, because he could not very well wait until the last day, the day immediately before the case came on in court, to present himself in Cape Town. The Court will order that the petitioner's expenses be paid, in case the taxing officer is satisfied that he was a necessary witness—the expenses will be allowed if the taxing officer decides that they are necessary. As to the other costs, I think they should be paid by the respondent

—the expenses of the application made on the 1st day of November were a necessary part of the costs in the petition. The order of the Court is that the costs include the personal expenses of the petitioner, in case the taxing officer is satisfied that he was a necessary witness. It must be clearly understood, however, that the witness will not receive remuneration for the whole time during which he was in town—the costs will be for travelling expenses, and for such time as he would be in Cape Town as a witness.

[Petitioner's Attorney, V. A. van der Byl: Respondents' Attorneys, Messrs. Van Zyl & Buissinné.]

HARDING V. SAUER.

This was an application to fix a date for the trial of the Aliwal North election petition and to amend the schedule of particulars.

Sir Henry Juta appeared for the applicant, and Mr. Searle, Q.C. (with whom was the Attorney-General), appeared for the respondent.

Leave was granted, and the case was set down for January 30. Costs to be costs in the cause.

BURTON V. RHODES AND HILL.

This was an application by the respondents in an election petition for a commission *de bene esse* to take the evidence of Mr. Rhodes, on the ground that it was necessary for him to go to England before the trial on urgent business.

Mr. Innes, Q.C. (with whom was Mr. Graham, Q.C.), for the present applicants.

Sir Henry Juta, Q.C., for the respondent.

The Court granted the application, and appointed Mr. Howel Jones as commissioner to take evidence. Costs to be costs in the cause.

DE WAAL V. SIVEWRIGHT.

This was an application by the respondent in an election petition for a commission *de bene esse* to take the evidence of Sir James Sivewright.

Mr. Graham, Q.C., for the present applicant, and Mr. Searle, Q.C., for the respondent.

Mr. Graham stated that he applied for a commission because Sir Jas. Sivewright was advised by his medical adviser to take a trip to Europe for the benefit of his health.

The Court granted the application, and appointed Mr. Howel Jones to take the evidence. Costs to be costs in the cause.

DE VILLIERS AND GOUWS V. VANES AND LEE.

This was an application by the respondents in the Uitenhage election petition for a commission *de bene esse* to take the evidence of Sir James Sivewright, who was one of those mentioned in the schedule of corrupt practices, and for the fixing of a date within which any further charges must be filed.

Mr. Innes, Q.C. (with whom was Mr. Graham, Q.C.), appeared for the present applicants (the respondents in the main action.)

Mr. Searle, Q.C. (with whom was the Attorney-General), appeared for the respondents (the petitioners in the main action).

Mr. Searle said he had no objection to the appointment of a commissioner, and there would be no fresh charges in connection with Sir James Sivewright, but as it appeared that the applicants now wanted an order with regard to any fresh charges, he suggested that the Court should give until the end of the year for the filing of such charges.

Mr. Innes assented to that.

The Court made an order appointing Mr. Howel Jones as commisioner to take the evidence of Sir James Sivewright, and fixed December 31 as the latest date for filing any further charges.

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice SOLOMON.]

IN THE ESTATE OF THE LATE PISANI. { 1898. Dec. 20th.

Ord. 104, sections 21, 22, 23—Appointment of executor.

The Master of the Supreme Court is not bound to appoint as executor of an estate the person selected as such at a meeting of heirs and next-of-kin, but may use his discretion in the appointment.

Mr. Buchanan applied for an order compelling the Master of the Supreme Court to appoint the petitioner as the executor dative in the estate of his late father, or to confirm the selection of the petitioner as such in accordance with the resolution at a meeting of the heirs and next of kin, held on November 29.

The petitioner was a son of the late Jacobus Christian Pisani, who had by his last will instituted his wife (not the petitioner's mother) sole heiress. The said wife died intestate shortly after. Meetings of heirs and next of kin to select executors in both estates were convened for the same day, namely November 29. At the meeting held in his father's estate, the applicant was duly proposed and seconded as the executor dative in the estate. He thereafter paid the fees, and entered into the necessary security, which was approved of by the Resident Magistrate at Beaufort West, before whom the meeting had been held. On December 15, however, he received back the fees he had paid, and an intimation that the Master of the Supreme Court declined to confirm his appointment as executor dative in the estate on the ground that Mrs. Pisani was the sole heir, although the children were lineal descendants, and stating that Mr. Pritchard had been appointed executor.

Mr. Buchanan referred to Ordinance 104, sections 21, 22, 23. The Master should appoint some one present at the meeting. *Brand's Executor* v. *Brand's Executors* (Juta 4, p. 320).

In reply to Mr. Justice Maasdorp,

The Master of the Supreme Court said that the reason he refused to confirm the appointment was because the children were not heirs, and had no interest in the management of the estate. He had, therefore, a valid reason for passing over any of those mentioned in the Ordinance.

Maasdorp, J., said: The meetings called were simply for the purpose of advising the Master in the appointment of an executor, but he was not bound to appoint the person selected by such meeting. He had the power to use his discretion, and in the present case he regarded it as better for the estate that Mr. Pritchard should be appointed, he really representing the interests of those who were virtually interested in the estate. The testator appointed his wife sole heir. She died intestate, so that the parties interested in the estate would be the heirs not of the husband but of the wife. Those interested in the wife's estate had appointed Mr. Pritchard, and the Master considered that he would be the fit and proper person to administer the estate of the husband also the work of the administration in the estate being nothing more than passing transfer of certain property in the estate. Consequently there was no reason why the discretion of the Master should be interfered with.

Mr. Justice Solomon concurred.

IN THE ESTATE OF THE LATE B. J. BOTHA.

This was an application for the appointment of a *curator ad litem* in the estate of the late B. J. Botha, of Fort Beaufort, for the purpose of assisting minors in the subdivision of certain properties.

Mr. Gardiner appeared for the petitioner.

The application was granted, and Mr. Barend Engelbrecht appointed *curator ad litem*.

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice SOLOMON.]

PETITION OF ELLIE STEYN. { 1898. Dec. 21st.

Mr. McGregor applied for an order for the management of the estate of the petitioner's father to be placed in the hands of the Board of Executors, or that such order might be made as to the Court might seem consistent with the circumstances of the case. It was stated that petitioner's father was a retired farmer possessed of considerable landed property, but was now in indifferent health and incapable of attending to his affairs.

The Court granted a rule *nisi* calling upon the respondent to show cause why he should not be held incapable of attending to his own affairs the notice to be served on the respondent and also on the *curator ad litem* (Mr. Advocate De Waal) appointed to represent him. Order returnable on the 12th January next.

Postea (January 16th, 1899).

The rule was made absolute.

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

BURTON V. RHODES AND HILL; DE WAAL V. SIVEWRIGHT; GOUWS AND DE VILLIERS V. VANES AND LEE. } 1898. Dec. 23rd

Mr. Graham, Q.C., moved for an order sanctioning the employment of two shorthand writers to note the evidence of the witnesses authorised to be taken before a commission. A consent paper had been signed by the attorneys of the various parties agreeing to this course.

An order was granted in terms of the consent paper.

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